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Appendix

Supreme Court of the United States

OCTOBER TERM, 1950

No. 695

JOSEPH THOMAS MULLEN,

Petitioner

— v. —

UNITED STATES

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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APPENDIX.

RELEVANT DOCKET ENTRIES

Date 1968	
3/11	Indictment returned and filed.
3/18	Motion to dismiss indictment filed in open court.
3/19	Arraignment Order signed by Judge Gordon 3/18/68. Plea of NOT GUILTY entered as to the one count.
	Case set for trial before a Jury on 4/5/68. All Motions will be heard on 3/21/68.
3/21	Motions filed in open court as follows: Motion to Dismiss Indictment and Quash Jury Venire, with Points and Authorities & Affidavit. Motion for Discovery and Inspection; Points and Authorities in Support of Defendant's Motion to Dismiss (additional one).
3/21	Order on hearing held 3/21, signed by Judge Gordon: overruling motion for stay of proceedings and certain parts of discovery motion; others taken under advisement for ruling to issue 3/22 when hearings continued. Cys to US Atty. and Mr. Sedler.
3/25	Order on hearing held 3/22, signed by Judge Gordon 3/22: motion to dismiss and quash jury venire overruled; motions for discovery overruled; Court reaffirms ruling of 3/21 re request for other

Date 1968	
	deferment requests; motion to dismiss re unconstitutionality of SS Act, overruled; case continued to 4/5/68 for trial. Cys to US Atty. and Mr. Sedler.
4/2	ORDER signed by Judge Gordon on Mr. Sedler's motion: overruled as to Item 1, Sustained as to Item 2 and Clerk of Court directed to prepare necessary information; overruled as to Item 3. Cys to Mr. Sedler and US Atty.
4/5	Motion for Judgment of acquittal filed by Mr. Sedler; Jury instructions tendered.
4/5	Verdict returned in open court and filed, reading as follows: "We, the Jury, find the defendant, JOSEPH THOMAS MULLOY, GUILTY as to the first count of the Indictment. April 5, 1968 /s/ Jack Kunnecke, Foreman."
4/8	TRIAL ORDER signed by Judge Gordon 4/8 on trial held 4/5 and reflecting above verdict; Cys to Mr. Sedler and US Atty.
4/10	JUDGMENT & COMMITMENT signed by Judge Gordon dated 4/8; 5 years on the 1 ct and fine of $10,000; defdt to stand committed for fine; advised of all rights regarding appeal.
4/8	Notice of appeal by Joseph Thomas Mulloy to US Court of Appeals for 6th Circuit—filed. Copy mailed to US Attorney.
Date 1969	
6/10	Conviction affirmed by US Court of Appeals for 6th Circuit.
8/29	Petition for rehearing denied by US Court of Appeals for 6th Circuit.

[Opinion of the Court below, reported 412 F.2d 421]

FILED
JUN 10 1969
CARL W. REUSS, Clerk

No. 18709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH THOMAS MULLOY,
Defendant-Appellant.

APPEAL from United State District Court for the Western District of Kentucky.

Decided June 10, 1969.

Before: WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

WEICK, Chief Judge. Appellant Mulloy was convicted in the United States District Court of wilfully refusing to submit to induction into the Armed Forces, in violation of Military Selective Service Act of 1967. 50 U.S.C. App. § 462(a). A sentence of five years' imprisonment and a fine of $10,000 were imposed.

Appellant contends that the grand jury and the petit jury were improperly constituted; that the Universal Training Service Act as amended in 1967 is unconstitutional; and that the Vietnam war is illegal. These same contentions were made in *United States v. Pratt*, — F.2d — (No. 18,710, 6th Cir. 1969), which case was consolidated for argument with this one. For the reasons and upon the authority relied upon in *Pratt*, we reject these contentions.

Appellant further contends that his procedural rights were violated by the refusal of his Local Board to reopen his classification of 1-A (available for military service) which

was granted to him by the Appeal Board. He asserts that this was arbitrary and unreasonable and constituted an abuse of discretion; and that it deprived him of a second administrative appeal and violated his constitutional rights.

Mulloy registered for the draft on June 13, 1962. He filed his Classification Questionnaire (SSS Form 100) on June 17, 1963. He did not at that time request an exemption as a conscientious objector. On November 22, 1963 his Local Board classified him 2-S (college student), which classification remained for four years. After leaving college he was employed by the Appalachian Volunteers, operated by the Office of Economic Opportunity, and was granted a one-year occupational deferment by the Board. Upon expiration of this deferment, he requested another occupational deferment so that he could continue his work with the Volunteers, but the Board on May 17, 1967, in accordance with its policy in such cases to limit deferment to one year, denied his request and classified him 1-A.

On May 17, 1967 Mulloy was ordered to report for a physical examination. On May 19th he wrote a letter appealing to the Board to review and reconsider his request for an occupational deferment. On June 26th he was found qualified at the Armed Forces Examining Station and was notified of his acceptability by Statement of Acceptability (DD Form 62). The Board wrote Mulloy on July 3, 1967, asking whether he wanted it —

> ". . . to first review your file and then forward it to the Appeal Board or simply forward to the Appeal Board only . . . ."

He replied that he —

> ". . . appealed the classification on the grounds of occupation and asked for a renewal of my 2-A deferment. . . . Please do what is necessary to reconsider my classification."

On July 17, 1967 the Board issued an order to Mulloy to report for induction. He then requested that his appeal be forwarded to the Board of Appeal and also asked for a personal appearance. The Board denied his request for personal appearance because the request had not been made within thirty days after classification, as required by the regulation (32 C.F.R. § 1624.1(a)). Although his right to appeal had expired, and because of an apparent misunderstanding, the Board forwarded his file to the Appeal Board and cancelled the order to report for induction. On August 16, 1967 the Appeal Board classified him in 1-A by a 5-0 vote.

On September 5, 1967, the Board received a letter from Mulloy advising that he was under arrest and out on bail charged with sedition for teaching and advocating the violent and forceful overthrow of the United States Government and the State of Kentucky. On September 21, 1967 the Board issued an order to report for induction on October 16, 1967. This was the second induction order. On October 9th the Board received another letter from him advising that he was still under a $5,000-bond in the U.S. 6th District Court and also under a $500-bond to the Pike County Court "on the charge of flourishing a deadly weapon. I request that you cancel that induction order . . . ."

On October 12, 1967 the Board cancelled the second order to report for induction and advised Mulloy by letter of its action. On the day after he was scheduled to report for induction under the cancelled order, he wrote to the Board asking for "A Conscientious Objector Application Form", which was supplied to him. He returned it to the Board with attachment thereto on October 30, 1967. In his letter enclosing the form he stated that his lawyer advised that he was still under bond to the Federal Court in Lexington and "I request a personal interview with my Board to discuss my appalachian."

The Board replied by letter advising him that his appeal rights and personal appearance time had both expired but that

it was granting him a personal appearance through courtesy. 32 C.F.R. § 1625.1(c).

Mulloy appeared at the meeting. The Board received and placed in his file a number of letters in support of his request. The Clerk of the Board prepared a resume of his appearance and placed it in his file. The resume indicates that the Clerk was instructed to write to the Federal Court in Lexington to inquire concerning his appeal and bond. The resume further stated:

> "Until such time as a reply is received, the members would not consider him a C.O."

An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened."

On November 17, 1967, the Board received a letter from Mulloy in which, among other things, he stated:

> "This brings us to the war in Vietnam and my draft situation. I do not question individual integrety [sic] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience
>
> . . . .
>
> "Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interests, now and in the future generations, to follow my conscience.
>
> "I feel that you are going to try to draft me anyway, regardless of my feelings. *I have not made up my mind as yet.* If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. *If I choose not to go into the Army I will resist induction and make the biggest stink about it possible.* I must do this to bear witness to my beliefs and to cause my fellow citizens to think. . . ." [Italics ours]

By letter dated December 2, 1967, Mulloy advised the Board that he had been "fired" by the Appalachian Volunteers "for stating that I am a C.O. and would refuse induction if ordered"; and that as far as he knew he was still under bond to the Federal Court.

On December 6, a letter from the Clerk of the District Court at Lexington was placed in his file which stated that Mulloy was recently a plaintiff in a civil action filed on the Pikeville Docket, but that the Clerk had "no information of his ever being a defendant in a matter in this court either civil or criminal."

On January 3, 1968, Mulloy wrote to the Board stating that he was now employed by the Southern Conference Educational Fund in Louisville and was working on a book "about my experience with the Poverty War in Appalachia"; and that the sedition charges had been dropped and the bond released. He was not sure about the Pike County peace bond.

On January 19, 1968, he was advised by letter from the Board that his file had been reviewed at its meeting held on January 11th, and that the members felt that the information in his file did not warrant a reopening of his classification. On January 21, Mulloy wrote to the Board appealing from the Board's failure to reclassify him 1-O. He stated that he considered the November interview a reopening of his case. The Board wrote in reply two days later that it did not consider the courtesy appearance as a reopening of his case since his time for appeal and personal appearance had expired. He was ordered to report for induction on February 23, 1968, but refused to submit.

Selective Service Regulation 32 C.F.R. § 1625.2, entitled "When Registrant's Classification May Be Reopened And Considered Anew," provides in part that the Local Board may reopen and consider anew the registrant's classification upon written request of the registrant —

> ". . . if such request is accompanied by written information presenting facts not considered when the registrant

was classified, which, if true, would justify a change in the registrant's classification."

Selective Service Regulation 32 C.F.R. § 1625.4, entitled "Refusal to Reopen And Consider Anew Registrant's Classification," provides in part:

". . . [E]ven if new facts are presented, [when] the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification."

Under Regulation 1625.2 the Board has discretion to determine whether or not it will reopen a classification, but Regulation 1625.4 appears to be mandatory in that the Board *shall not* reopen the classification when it is of the opinion that the facts, if true, do not justify a change in the classification.

In *Smith* v. *United States*, 157 F.2d 176 (4th Cir. 1946) Judge Soper, who wrote the opinion for the Court, said:

"Whether or not the additional evidence was of sufficient weight to require a reopening of the case lay within the discretion of the board and it cannot be said under the circumstances that the discretion was arbitrarily exercised." *Id.* at 181.

Smith was followed by the Seventh Circuit in *United States* v. *Bartelt*, 200 F.2d 385, 389 (7th Cir. 1952).

Mulloy contends that in determining whether to reopen the classification the Board was limited to consideration of only the Special Form For Conscientious Objector (SSS Form 150). In our judgment, the Board had not only the right but also the duty to consider not only the form but also the attachment thereto, the letters received in connection therewith and the entire file. This is implicit in the holdings of the Second Circuit in the two *Gearey* cases. *United States* v. *Gearey*, 368 F.2d 144 (2nd Cir. 1966); *United States* v. *Gearey*, 379 F.2d 915 (2d Cir. 1967).

In *Gearey*, the Board considered on the merits the request to reopen a classification after an order to report for induction, and the Court held that there was a rational basis for the Board's determination that the registrant was not a genuine conscientious objector and the Board therefore was not required to reopen his classification.

Appellant's contention, if upheld, would result in interminable delays in proceedings before Local Boards and indeed might frustrate the operation of the Selective Service System.

> "As the Tenth Circuit has pointed out, religious 'conversions' of convenience might well upset the orderly administration of the selective service system." *United States* v. *Taylor*, 351 F.2d 228, 230 (6th Cir. 1965).

Under Mulloy's contention, all a registrant needs to do is to state facts in support of his application and the Board is limited to his statement. In our judgment, the facts stated must be true and the Board has the power to investigate and determine the truth. Suppose a registrant who is classified 1-A requests the Board to reopen his classification and place him in 3-A, alleging that he is living with and supporting his wife and family. If appellant's allegations were true, the Board would be obligated to reopen his classification and reclassify him. *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956). However, the Board, under the investigative powers granted to it in 32 C.F.R. § 1625.1(c), may learn that the allegation was false. Is the Board nevertheless required to reopen his classification and reclassify him? We say, "No."

The Military Selective Service Act of 1967 omitted the provision contained in the 1940 Act for referral to the Department of Justice of conscientious objectors' claims, including the provision for appeal to the Appeal Board of Local Board action denying conscientious objector classification.

The legislative history of the statute indicates Congressional concern for "unusually long and unnecessary delay in processing

cases in the Department of Justice." H.R. No. 267, 90th Cong., 1st Sess. 1308, 1333-34 (1967). Congress was also of the belief that the decision of the Supreme Court in *United States* v. *Seeger*, 380 U.S. 163 (1965), had broadened the basis on which conscientious objection could be made, and resulted in an increase of administrative appeals and delays. The definition was changed so that conscientious objection must be based solely on religious training and belief, not including "essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C.App. § 456(j).

Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief. He even indicated at that late date that he had not made up his mind as to whether he would go into the army. The letters which he wrote to the Board revealed that he was principally interested in an occupational deferment.

Furthermore, the Board had the right to consider inconsistent statements made by the registrant as well as any fact which cast doubt on his veracity. *Witmer* v. *United States*, 348 U.S. 375 (1955).

The Chairman of the Local Board testified in Court that the Board's decision was based on all information available, including the file and what he said. He further testified that Mulloy's claim for deferment was based principally upon his job. He testified:

> "His claim, taking everything, assuming everything he said down there at that time to be so, he still did not make out a case for conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there."

The Act provides that classification orders of the Board shall be final. 50 U.S.C.App. § 460(b)(3). The Courts have

limited the scope of judicial review to a determination of whether there is basis in fact for the classification. *United States* v. *Seeger, supra; Dickinson* v. *United States,* 346 U.S. 389 (1953); *Estep* v. *United States,* 327 U.S. 114 (1946); *United States* v. *Jackson,* — F.2d — (No. 18,645, 6th Cir. March 24, 1969); *United States* v. *Beatty,* 350 F.2d 287 (6th Cir. 1965); *cert. denied,* 382 U.S. 1028. Mulloy relies upon *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967) and *Freeman* v. *United States,* 388 F.2d 246 (7th Cir. 1967), which cases were decided under the 1940 Act and involved different facts. We regard the cases as inapposite.

In considering whether to reopen the classification, the Board had the right to take into account the original questionnaire filed by appellant in June, 1963. In Series VIII of that form under the heading of Conscientious Objector he printed: "Does Not Apply." Since his registration in 1962 he had been granted five years' deferments for college and occupation, an appeal before the Appeal Board, the cancellation of two orders to report for induction, and then when time was running out for him, he claimed for the first time on October 30, 1967, that he was a conscientious objector. Even then he was still maintaining that he should be classified in 2-A because of his work in Appalachia, and he had not made up his mind as to whether he would go into the army.

A letter written to the Board by his brother, Robert, while disagreeing with Mulloy's position, stated:

> "I believe my brother to be sincere concerning his feelings and he has maintained this position for a number of years."

If this were true, why did he wait so long to inform the Board?

It would further appear that what he wrote to the Board about being under a $5,000-bond in the Federal Court was not correct.

We are of the opinion that there was a rational basis for the Board's determination that Mulloy had not established a case of conscientious objection, and that the Board did not abuse its discretion in denying his request to reopen his classification. In our judgment, he did not make out a prima facie case of conscientious objection, and the additional information that he supplied did not justify a change in his classification. *United States* v. *Jackson, supra.* His claim to conscientious objection did not fool the Board nor the District Judge who, in sentencing him, said:

> "It is the observation of this court that in the trial of this matter you have worn out pretty well the claim of conscientious objector, which I think the record should reflect you did not assert for many, many months.[1]
>
> "In other words, in my judgment, you have suffered an instant conversion when you realized that the platoon sergeant was about to blow his whistle."

In our judgment, the courtesy hearing granted did not constitute a reopening of the classification. Other claims of error have been considered and are insufficient to warrant reversal.

The sentence of the court would appear to us to be rather severe. We do not have before us the presentence investigation which may have justified it. The District Court will have an opportunity to consider reduction of the sentence if request is made under Rule 35 of the Federal Rules of Criminal Procedure.

Affirmed.

---

[1] It was about four years.

McCREE, Circuit Judge, concurring. I concur in the result. Selective Service Regulation 32 C.F.R. § 1625.2 vests broad discretion in the Local Board, and since the Board was justified in considering the entire file (instead of being confined solely to appellant's conscientious objector application), I do not regard the decision not to reopen appellant's file as an abuse of that discretion. Accordingly, I find it unnecessary to consider the philosophical contours of conscientious objection in this appeal. I agree with the majority's statement questioning the propriety of imposing the maximum possible sentence in this case.

[Excerpt from Petitioner's Selective Service File: SSS Form 100]

SSS Form 100

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

(Approval not required.)

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR IN NUMBER			
Mulloy, Joseph Thomas	15	47	44	153

Date	Minutes of Action	Vote Yes	Vote No
7-25-67	Order for Induction for Aug. 17, 1967 cancelled. Members	3	0
	permitted file to be forwarded to Appeal Board, even though		
	period of appeal had expired.		
7-25-67	File forwarde to Appeal Board		
8-24-67	Filed returned from appeal Board. Class. 1A by vote 3-0		
8-28-67	mailed SSS 110 (notice of class.) & SSS 111 (class. advice)		
	to Mr. Thomas Rhodenbaugh, Bristol, Tenn.		
8/21/67	Mailed SSS 252, Order to Report for Ind., o. 10/16/67,		
10/12/67	SSS 127, DD 398 & instr., & DA Form 41.		
10-20-67	Order to report for induction on 10/16/67 cancelled.		
	mailed SSS 190 (Spec. Form for C. O.)		
10/30/67	Registrant returned completed SSS Form 150. Also received		
	letter requesting personal appearance.		
11/9/67	Registrant was granted a "courtesy personal appearance",		
	classification was not re-opened. Board is to obtain		
	additional information regarding appeal and bond.		
1-11-68	All information in file was considered including claim	4	0
	of Conscientious Objector. All Members present felt th is		
	information did not warrant re-opening of 1A class.		
1-23-68	mailed SSS-252 (Ord. to rep. for Ind.Feb.23,1968) DD F 398		
	and Instr., Ky. Bar pamphlet, and SSS F 127		
2-27-68	papers returned from examining station. SSS 261 (Delivery		
	List) shows Refused Induction.		

[Excerpt from Petitioner's Selective Service File: SSS Form 150]

Form approved.
Budget Bureau No. 33-R311.2

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service
Local Board No. 47
Room 106, VA Building
1405 W. Broadway
Louisville, Ky. 40203

(Local Board Stamp)

THIS FORM MUST BE RETURNED ON OR BEFORE
Oct. 30, 1967
(Ten days after mailed or issued)

Date of mailing or issuance Oct. 20, 1967

Date received back at local board .....

1. Name of Registrant			2. Selective Service No.
Mulloy (Last)	Joseph (First)	T. (Middle)	15 47 44 153

3. Mailing address: Rt. 2 Box 928 (Number and street or R.F.D. route) Pikeville, (City, town, or village) (County) Kentucky (State) (ZIP Code)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I, therefore, claim exemption from combatant training and service in the Armed Forces.

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

Or

(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief is a belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

See appendix

SSS Forms 150 (Revised 2-1-55). (The printing of 1-31-52 shall be used until exhausted.)

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

See appendix

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

See appendix

5. Under what circumstances, if any, do you believe in the use of force?

See Appendix

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

See appendix

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

See appendix

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended: From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked: From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19
			19	19
			19	19

3. Give all addresses and dates of residence where you have formerly lived.

Name or City, Town, or Village	State or Foreign Country	Number, Address or R. F. D. Route	Dates of Residence From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19
			19	19
			19	19

4. Give the name and address of your parents and indicate whether they are living or not.

Mr. and Mrs. Joseph P. Mulloy; Living

5. (a) State the religious denomination or sect of your father Catholic

(b) State the religious denomination or sect of your mother Catholic

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a religious sect or organization? ☒ Yes ☐ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

Roman Catholic Church Pope Paul Rome, Italy

(b) When, where, and how did you become a member of said sect or organization?

In June of 1944 at Baptism

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

Due to the fact that I travel a lot and there are few Catholic Churches nearby I cannot maintain regular attendence. I am spiritually cared for at St. Anthony Church, Norton, Va.

(d) Give the name, title, and present address of the pastor or leader of said church, congregation, or meeting.

Fr. William Browne, St. Anthony Church, Norton, Va.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

Pope Paul said before the UN "No more war, no never again. If you wish to be brothers let the weapons fall from your hands."

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, social, or labor organizations.

I am working to improve the lot of the poor with the following organizations: VISTA, the OEO, the Highlander Education Center, the Council of Southern Mtns., the Appalachian Volunteers, numberous community action programs, the Southern Conference Educational Fund, The Southern Student Organizing Committee, The Appalachian Group to Save the Land and People, the Marrowbone Flok School, JOIN in Chicago, the Glenmary Southern Project, and many more.

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

NAME	FULL ADDRESS	OCCUPATION OR POSITION	RELATIONSHIP TO YOU
Fr. William Browne	St. Anthony Chur. Norton	Va. Priest	friend
Thorsten Horton	PO Box 2533 Pikeville,Ky	Teacher	friend
Carl Braden	3210 W. Broadway, Lou,Ky	Organizer	friend
Mrs. J. P. Mulloy	229 N. 37, Louisville,Ky	Housewife	mother

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Joseph T. Mulloy, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are (are, are not) in my own handwriting.

Registrant sign here

(Signature or mark of registrant)

(Signature of witness to mark of registrant)

Oct. 26, 1967
(Date)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

U.S. GOVERNMENT PRINTING OFFICE 1951—O 770-920

APPENDIX TO SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

SERIES II – RELIGIOUS TRAINING AND BELIEF

2 My religious training taught me that it is against God's law to kill. To be a member of the Armed Services of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men.

Yes, my belief in a Supreme Being does involve duties to which I am superior to those arising from human relation.

3 I was born to Catholic parents on June 1, 1944, and was baptized into the Catholic Church shortly thereafter. I attended St. Anthony and St. Columbia grade schools in Louisville. I studied the Bible and the meaning of various stories and parables such as the prodigal son and parable of the vinyard. I learned the catechism, the sacraments, the Ten Commandments, and the life of Jesus. In short, I learned the basic rudiments of Christian teachings. In the sixth grade I became an alter boy and assisted the priests at Mass regularly. I even once served the Archbishop in an Easter observance.

Missionary orders such as the Glenmary and the Maryknoll used to visit my class often in the eighth grade to tell us of their work. I was inspired by them and decided to become a priest. However, by high school time I was not sure and decided to wait. I was a young lad,

knowledgeable in the teachings of Christ but still ignorant as to their real meaning or significance. I needed more experience.

I entered Flaget High in 1958. The Xaverian Brothers were quite a change from the Nuns. We concentrated not on rote memorization but on understanding the laws and mysteries of the Church. God's love for man was a constant theme.

The motto of Bellarmine College is "In the search of truth." By the time I enrolled in the school I had begun my own search for truth. I began to doubt and I fancied myself an agnostic, then an atheist. I was rebelling and I went through an extremely hard religious crisis. This religious crisis coupled with several failures in my personal life and the sudden illness of my father caused me to despair. I attempted suicide.

During my recovery I began to read and grow again. I reenrolled in college and came back to the Church. I discovered Thomas Merton in a Monastery near Bardstown. Through his writings and poems he quickly became my mentor and spiritual advisor. I devoured everything that he wrote and found a great similarity between our lives and thoughts. An internal struggle was being waged inside of me again. I felt I was being pulled to the monastic life. Merton had chosen the life of prayer, the life of solitude. He was the outstanding example that the materials of this world were meaningless. He said that man must conquer himself before he could know fulfillment. Merton was non-violent. He was a hermit. He was "drunk with God."

I was attracted and deeply influenced. Many times I went to the Monastery to gaze at the gray walls, to walk in the garden and to be near the men who live but for God.

About this same time, 1965, I became involved with the Appalachian Volunteers. I jumped into this work with missionary zeal, determined to right the injustices. I was an organizer. Imbued with a sense of history and determined that I was right I threw myself into my work.

I found that this was the point that Merton and I differed on. He was a contemplative. He found his way to God in solitude and prayer. But I was an activist, a worker in the world. I found my solace and comfort in people. This was my path.

As I have tried to show my religious training has taught me basic laws of God. Love of God in every man is the supreme goal.

As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church attendance. And I place Thou Shalt Not Kill above An Eye For An Eye. I learned rapidly in my work in the southern Highlands of the significance of love and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way.

Violence only breeds violence.

As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and to love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO.

4 Thomas Merton, Gethsthemini, Ky., Jesus Christ.

5 I believe in the force of non-violence.

6 I am spending my life non-violently working among the poor. When I helped organize Jink Ray's resistance to strip mining I urged non-violent methods. I was successful and bloodshed was averted in a very tense situation. I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam.

7 I have trained many groups of VISTA volunteers for work in Appalachian communities. I had several occasions to tell such groups that non-violent change was what was needed in East Kentucky. I led discussions on non-violent organizing techniques. I have talked and expressed my views on this subject privately many times to my wife and friends. And I stated under oath in the U.S. 6th District Federal Court in Lexington in September of this year that I did not advocate the violent overthrow of any government. I stated I believe in the peaceful means provided for in the Constitution and the democratic process.

APPENDIX TO SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

SERIES III-- GENERAL BACKGROUND

1.

School	Type	Location	Dates
St. Anthony	Church	Louisville,Ky.	1950-51
St. Columbia	Church	Louisville,Ky.	1951-58
Flaget High	Church	Louisville,Ky.	1958-62
Bellarmine College	Church	Louisville,Ky.	1962-63
U of Louisville	Public	Louisville,Ky.	1963-64
U of Kentucky	Public	Lexington, Ky.	1964-65
U of Louisville	Public	Louisville,Ky.	1965-66

2.

Work	Employer	Address	Dates
Organizer	Council of Southern Mts.	Berea,Ky.	Jan-June,'66
Organizer	Appalachian Volunteers	Bristol,Te.	June '66-Now
Teacher	Highlander Education Cen	Knoxville	1966-Now

3.

Town	State	Address	Dates
Pikeville	Ky.	Box 928,Rt. 2	Mar. 67-present
Wise	Va.	Box 151 Rt. 1	Nov 66-Mar 67
Norton	Va.	1522 Main Ave.	Jul 66-Nov 66
Bristol	Tenn.	102 19th St.	May 66-Jul 66
Berea	Ky.	102 Boone St.	Jan 66-May 66
Louisville	Ky.	229 N. 37 St.	until Jan 66

[Letter from Joseph Thomas Mulloy to Local Board Dated February 23, 1966]

February 23, 1966

Local Board No. 47
Room 106—1405 W. Broadway
Jefferson County
Louisville, Kentucky
40203

2-24-66

Dear Sir:

I am writing to inform you of my change of address and occupation. My mailing address is COP 2307, Appalachian Volunteers, Berea, Kentucky, where I am Assistant Director of Field Operations.

I have asked Mr. Loyal Jones, Associate Director of The Council Of The Southern Mountains to write you concerning my draft status and requesting an occupational deferment. I sincerely hope that this request will be honored since I feel that my work is in the National interest.

That you for your consideration, I am,

Sincerely,

(s) Joseph Mulloy
Joseph Mulloy
Assistant Director of Field Operations.
15-47-44-153

JM/cjc

[Letter from Joseph Thomas Mulloy to Local Board Dated March 1, 1967]

(Stamped)
Local Board No. 47
Jefferson County
MAR 1 1967
Louisville, Ky. 40203

Joseph T. Mulloy
Box 122 Rt. 1
Wise, Va.
15-47-44-153

Selective Service
Local Board No. 47
Clerk M. Green

Gentlemen:

This is to inform you of my current address and occupation. Also my 2-A draft deferment runs out in March and I am seeking its renewal. I am still employed, as I was last year when granted a deferment, by the Appalachian Volunteers. Although the AV's are no longer connected with its parent organization, the Council of the Southern Mountains, it is a non-profit incorporated organization involved in the same kind of activity. That activity being developing low income communities and low income people into meaningful participation in American society. We are funded about 95% by the Office of Economic Opportunity (OEO) in Washington and are classified by them as a bona fide Community Action Program (CAP). We have field offices in Kentucky, West Virginia, and Virginia and have 42 VISTA workers under our supervision. The main office for the Appalachian Volunteers, Inc., is 511 Melrose Street, Bristol, Tenn. The director of the program and my immediate supervisor is Mr. Milton Ogle.

I am working right now in Wise County Virginia. I have seven (7) VISTA workers assigned to me and my job

title is that of Fieldman. We are right now preparing for a summer volunteer project involving up to 500 volunteers. The volunteers will be both college students from outside the area and indigenous local people.

I feel that the AV's are different from most social welfare agencies in that we are not concerned with doing FOR people. We, rather, concentrate on people doing for themselves with us supplying the confidence, advice, or initial push. This is the only way in which the area can be improved. For the people to improve it themselves. This also helps to check the unfortunate trend towards handouts and doles which do nothing but perpetuate the situation.

It is for the above reasons that I feel that my work in the mountains is in the National interest. Appalachia is a blight on the face of our society and its problems affect the entire country. I ask that you give your every consideration to renewing my 2-A status.

Thank you.

Sincerely,

(s) Joseph Mulloy
Joseph Mulloy

P.S. I am planning to be married on the 25th of March, 1967. I will forward to you a copy of my marriage license for your files.

[Letter from Appalachian Volunteers to Local Board Dated March 4, 1967]

APPALACHIAN VOLUNTEERS, INC.
Phone 615-968-2127
P. O. Box 3269 Bristol, Tennessee 37620

(Stamped)
Local Board No. 47
Jefferson County
MAR 6 1967
Louisville, Ky. 40203

March 4, 1967

Selective Service System
Local Board No. 47
Room 106
VA Building
1405 West Broadway
Louisville, Kentucky

Re: Joseph T. Mulloy
Selective Service No. 15-47-44-153 2A

Sirs:

This letter is to inform you that Mr. Mulloy is employed by Appalachian Volunteers, Inc., as a field man in Wise County, Virginia, and Pike County, Kentucky.

Mr. Mulloy is in charge of a staff which is working to develop training programs, job opportunities, and better educational opportunities for many of the poor citizens in his area. Mr. Mulloy supervises a staff of seven VISTA Volunteers as part of the national War on Poverty.

To lose the services of Mr. Mulloy at this time would be a serious blow to our program and to the hopes and aspirations which he has aroused in the people of his area. We feel it is in the national interest that Mr. Mulloy be allowed to continue his vital role in the region. If we may be of

further assistance to you in this matter, do not hesitate to call upon us.

Sincerely yours,

(s)Milton Ogle
Director

1b

[Letter from Joseph Thomas Mulloy to Appeal Board Dated May 19, 1967]

(Stamped)
Local Board No. 47
Jefferson County
MAY 23 1967
Louisville, Ky. 40203

May 19, 1967
Box 92 8 Rt. 2
Pikeville, Ky.

Appeals Board
Selective Service
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Re: Joseph Mulloy
15-47-44-153

Dear Sirs:

On May 16, 1967, I received my notice of classification of 1A from my local Board No. 47. This letter is an official appeal to you to review and reconsider my request for an occupational deferment.

In March of 1966 I received a classification of 2A for my work in the mountains of Eastern Kentucky for the Appalachian Volunteers, Inc. Today I am more deeply than ever involved in working with the rural poor and feel that at least one more year is needed to acheive satisfactory results.

I hope that you will give this matter serious consideration.

Sincerely,

(s) Joseph Mulloy
Joseph Mulloy
15-47-44-153

P.S. I was married on the 25th day of March and have since moved to the new above address.

[Letter from Local Board to Joseph Thomas Mulloy
Dated July 3, 1967]

July 3, 1967

Mr. Joseph Thomas Mulloy
Rt. 2 Box 356 M
Pikeville, Ky.

Dear Mr. Mulloy:

This Board has not overlooked your letter of May 23, 1967. It is Selective Service Regulations that a file cannot be forwarded to the Appeal Board until after the Appeal period has lapsed. I was then away for 2 weeks and due to the amount of work, I am now just getting to your letter.

Do you mean that you want the Board to first review your file and then forward to the Appeal Board or simply to forward to the Appeal Board only?

A Board meeting is planned for this month, but the date has not yet been set.

Yours truly,

Local Board 47

(Miss) M. Green
Clerk

[Letter from Joseph Thomas Mulloy to Local Board Dated July 10, 1967]

(Stamped)
Local Board No. 47
Jefferson County
JUL 12 1967
Louisville, Ky. 40203

44-153
Joseph Mulloy
July 10, 1967

Dear Miss Green,

On May 18, 1967, my board reclassified me as 1-A. I xxxxx appealed that classification on the grounds of occupation and asked for a renewal of my 2-A deferment.

I do not understand fully the proceeds you suggested. Please do what is necessary to reconsider my classification.

Thank you,

(s) Joseph Mulloy

Box 928
Rt. 2
Pikeville, Ky.

[Letter from Joseph Thomas Mulloy to State Director Dated July 20, 1967]

(Stamped)
Local Board No. 47
Jefferson County
JUL 21 1967
Louisville, Ky. 40203

July 20, 1967

Taylor L. Davidson
State Division of Selective Service
Frankfort, Ky.

Dear Sir:

I am writing to request your intercession to correct a procedural error of my local Board.

In March of 1966 I received a 2-A occupational deferment from my local board. I was employed by the Appalachian Volunteers.

In March of 1967 as my one year deferment ran out both I and my employer, Appalachian Volunteers, wrote my local board requesting a renewal of my 2-A occupational deferment.

On May 16, 1967, I was reclassified 1-A by my local board.

On May 17, 1967, I was ordered to appear for a physical examination on June 26 in Louisville.

On May 23, 1967, I appealed in writing this classification to my local Board, again asking for a 2-A deferment.

On June 26, 1967, I appeared for my physical exam and was subsequently notified that I had passed.

On July 3, 1967, my local board wrote me stating that they had been on vacation and were just getting to my written appeal. They also stated that they did not understand if I wanted the local board to review my file and send it to the Appeal Board or to send it directly to the Appeal Board.

A few days later I wrote my local board stating I did not know the procedural differences in their question. I stated again that I was appealing my classification, wished to be reclassified 2-A, and to take my appeal through the proper channels.

On July 17, 1967, I was ordered to report for Induction into the armed services on August 17, 1967.

On July 20, 1967, I telephone my local board and asked the Clerk what was going on. She replied that the local board was meeting today and that they would take up the matter of my appeal and my induction.

On July 20, 1967, upon advice of counsel I am writing for your assistance. I have also requested that my employer write another letter to my local board.

I have been advised that my induction order is invalid since I had made timely appeal and this had not been considered by the Appeal Board. Please have it canceled.

I am now requesting action upon my appeal of May 23, 1967, and a personal appearance before my local board.

Sincerely,

(s) Joseph Mulloy
Joseph Mulloy
15-47-44-153
Box 928 Rt. 2
Pikeville, Ky.

cc. Local Board No. 47
1405 W. Broadway
Louisville, Ky.

John Reints
Central Committee for C O
Philadelphia, Penn.

[Letter from Joseph Thomas Mulloy to Local Board Dated July 20, 1967]

(Stamped)
Local Board No. 47
Jefferson County
JUL 21 1967
Louisville, Ky. 40203

July 20, 1967

Selective Service
Local Board No. 47
Louisville, Ky.

Dear Sir:

Upon advice of counsel I understand that my order for Induction issued on July 17, 1967, is invalid, since I have had a timely appeal outstanding as of May 23, 1967.

The issuence of this Induction order deprives me of my legal appeal rights. Please cancel this Induction order.

I now again request that my appeal be forwarded to the Appeals Board and ask that you grant to me a personal appearance as soon as possible.

Sincerely,
(s)Joseph Mulloy
Joseph Mulloy
15-47-44-153
Box 928 Rt. 2
Pikeville, Ky.

cc. Taylor L. Davidson
State Division of Selective Service
John Reints
Central Committee for CO
Philadelphia, Penn.

[Letter from Appalachian Volunteers to Local Board Dated July 20, 1967]

APPALACHIAN VOLUNTEERS, INC.
P.O. Box 3269 Telephone 615-968-2127
Bristol, Tennessee 37620

(Stamped)
Local Board No. 47
Jefferson County
JUL 24 1967
Louisville, Ky. 40203

July 20, 1967

Selective Service Board Number 47
Room, 107, VA Building
1405 W. Broadway
Louisville, Kentucky 40203

Re: Joseph T. Mulloy
Route # 2, Box 128
Pikeville, Kentucky
Selective Service No. 15-47-44-153

Dear Sirs:

Mr. Joseph Mulloy, a Field Coordinator with our program, has notified us that he is to be inducted into the

Armed Services on August 17, 1967. It is my understanding that Mr. Mulloy has an appeal pending with the State Appeals Board and, therefore, I am asking you if the induction notice was an oversight on your part.

Mr. Mulloy has worked with our program during the past year and a half. The work which he is doing is of vital importance to the Appalachian Volunteers program, but more important, to the people in Pike County with whom he works. Mr. Mulloy's dedication and service would make his replacement difficult.

I hope that every attempt will be made to hear Mr. Mulloy's plea. His loss at this time would seriously disrupt our programs in Pike County.

Sincerely yours,

(s) Thomas Rhodenbaugh
Thomas Rhodenbaugh
Director of Field Operations

TR:jch

cc: Taylor L. Davidson, State Director of Selective Service
John Reints, Central Committee for Conscientious Objectors Joseph T. Mulloy

[Letter from Local Board to Joseph Thomas Mulloy Dated July 25, 1967]

July 25, 1967

Mr. Joseph Thomas Mulloy
Rt. 2 Box 356-M
Pikeville, Ky.

Dear Mr. Mulloy:

The Board Meeting was held this date, July 25, 1967 and not on July 20, 1967. The Board Members concurred

that your Order for Induction for August 17, 1967 be cancelled. You are not to report for Induction.

Your file is being forwarded to the Appeal Board this date. The Members granted this even though the Appeal period was up.

The Members had requested that I present your file to them at a Board meeting, since there was a question as to whether you meant that you were appealing for the Members to review your file or whether you meant you wished your file to be forwarded to the Appeal Board.

The issuance of the Induction Order was not an oversight. When I talked with the Members they stated for me to issue the Order, so that there would be no question of your being skipped over.

Yours truly,

Local Board 47

(Miss) M. Green
Clerk

Copy Thomas Rhodenbaugh
Appalachian Volunteers, Inc.
Bristol, Tennessee

[Letter from Joseph Thomas Mulloy to Local Board Dated September 2, 1967]

(Stamped)
Local Board No. 47
Jefferson County
SEP 5 1967
Louisville, Ky. 40203

HOLIDAY INN OF CINCINNATI-NORTH
Millcreek Expressway (North Int. 75-U.S. 25)
At Sharon Rd. Exit
Cincinnati, Ohio 45241

Box 928 Rt. 2
Pikeville, Ky.
Sept 2, 1967

Selective Service
Local Board # 47
Louisville, Ky.

This is to inform you that I am under arrest and out on bail charged with sedition. I was arrested on Aug. 12, 1967, by Pike Co. officials and charged with teaching and advocating the violent and forceful overthrow of the U. S. Government and State of Ky. The case is now pending in the 6th U. S. Federal District Court in Lexington, Ky.

I will, of course, keep you informed as to further developments.

Sincerely,

(s) Joseph Mulloy
15-47-44-153

[Letter from Joseph Thomas Mulloy to Local Board Received October 9, 1967]

(Stamped)
Local Board No. 47
Jefferson County
OCT 9 1967
Louisville, Ky. 40203

Box 926 Rt. 2
Pikeville, Ky.

Joseph Mulloy
15-47-44-153

Selective Service
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Dear Sir,

I am sure that you are aware of my present situation, both from my letter to you and from the newspaper reports. My legal complications are by no way solved since I am still under $5,000 bond to the US 6th District Court. There is still the possibility of Mr. Ratliff appealing the decision to the US Supreme Court. If this happens the case could drag on for several more months. As it stands now the US District Court will notify me when my Bond is waived and I of course, will notify you.

I am also under $250 bond to the Pike County court on the charge of flourishing a deadly weapon. This case is still pending.

I am advised that I cannot be ordered for induction while I have a court case pending. On Sept. 21 of this year you ordered me to report for induction on Oct. 16, 1967.

I request that you cancell that induction order.

Your action in drafting me while I have court cases pending causes me great concern. It also makes me question the fairness with which you are handling my case.

This is the second procedural error leading to an induction order that you have made in my case. I want to call to your attention that although some consider me to be a controversial person, I am still entitled to legal rights.

I am still working in Pike County and to stay here throughout the current dispute. Please note that my addres is Box 928, and not 356M.

Again, I request that you cancell my induction order and we will both await the decisions of the courts. Thank you.

For a free south,

(s) Joseph Mulloy
Joseph Mulloy

CC. State Director
Selective Service
Frankfort, Ky.

[Letter from State Director to Board
Dated October 9, 1967]

(Stamped)
Local Board No. 47
Jefferson County
OCT 10 1967
Louisville, Ky. 40203

STATE HEADQUARTERS FOR SELECTIVE SERVICE
COMMONWEALTH OF KENTUCKY
220 Steele Street
Frankfort, Ky. 40601

October 9, 1967

Selective Service
Local Board No. 47
Louisville, Ky.

Subject: Joseph Mulloy
SS No. 15-47-44-153

Dear Mr. Chairman and Board Members:

Attached is copy of letter from registrant which is self explanatory.

The order to report for induction should be canceled, and the registrant classified in Class IV-F so long as he is under the jurisdiction of the Court.

Sincerely,

For the State Director
(s) Henry L. Bethel, Jr.
Henry L. Bethel, Jr.
Lt. Colonel, AGC
Chief, Field Operations Division

Attachment

[Letter from Local Board to Joseph Thomas Mulloy Dated October 12, 1967]

October 12, 1967

Mr. Joseph Thomas Mulloy
Rt. 2 Box 356-M
Pikeville, Ky.

Dear Mr. Mulloy:

This letter cancels your order to report for Induction on October 16, 1967. Do not report. Since you are under the jurisdiction of the Court, you will be considered for a 4-F classification.

Yours truly,

Local Board 47

(Miss) M. Green
Clerk

[Letter from Joseph Thomas Mulloy to Local Board
Dated October 17, 1967]

Oct 17, 1967
Box 928 Rt. 2
Pikeville, Ky.

Selective Service System
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Dear Sir,

I am writing to formally request a conscientious objector application form. I wish to file a CO claim.

After much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector. I am therefore opposed to war in any form.

In my studies of history I have found a strong correlation between religious practices and political realities. In essence the two are almost interchangeable. The prevailing religious attitude of a certain age almost consistently justifies the politics of that age. And when the politics of men demand new conquests or an expansion of the economy the religion was tailored to the situation. I point out the Crusades, the settlement of the American West, and the Vietnam War as three easy examples. The Crusades were launched under the guise of returning the Holyland to the Christians; the atrocities committed in the West were done under the banner of "Manifest Destiny" with bible quoting missionaries leading the way; and the most inhumane of all wars, the one in Vietnam, is justified as a stand against godless communism.

When I was a small child I was taught that men should love their fellow man and Thou Shalt Not Kill. But a child is taught many things and few have any real significance or understanding until the child reaches adulthood. The adult begins to move about in the world testing his early lessons, discarding some, keeping others until with maturity he forms his personal beliefs.

My adult experience has caused me to test severely many of my early teaching. The gross injustices in society have caused me to question my own existence, the dishonesty and greed of the politicians in Eastern Kentucky have made me angry, and the horror's of war have thrilled me at the moves and privately made me shiver.

I have been taught, I have experienced, and I have decided I cannot, I wil not, participate in the injustices, the killings, and the wars. I will adhere to the basic teaching of Jesus and do everything I can to promote peace, understanding and Love. It is with these thought in mind that I request to be classified a conscientious objector.

For your interest I am still employed by the Appalachian Volunteers, Inc. Present projects include stopping strip mining, establishing a welfare rights organization, and research on absentee owned coal fields.

Also inclosed is a newspaper which will give you some background on the sedition charge along with literature on an anti-war demonstration which I am planning to attend.

Please send the CO form.

Sincerely,

Joseph T. Mulloy
15-47-44-153

[Letter from Carl Braden to Local Board
Dated October 20, 1967]

SOUTHERN CONFERENCE EDUCATIONAL FUND (SCEF)
3210 West Broadway
Louisville, Kentucky 40211

(Stamped)
Local Board No. 47
Jefferson County
OCT 23 1967
Louisville, Ky. 40203

Oct. 20, 1967

Selective Service System
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Dear Board Members:

It has come to my attention that Joseph Mulloy, 229 N. 37th St., who is registered with your board, has asked for classification as a conscientious objector.

I want to tell you what I know about this fine young man, in order to help you reach a decision as to his status.

Joe is a very conscientious young man who is working very hard to help bring about a better world for the poor people in the mountains of Kentucky.

He is dedicated to the proposition that such peaceful action is the way to solve our problems, and that war merely adds to our problems and makes them worse.

Joe has told me numerous times how he feels about this and I admire him greatly for his stand. It is good that he feels such responsibility to his fellow man that he is willing to devote his life to the movement for human freedom.

A person who feels as Joe does is certainly a conscientious objector to war as a means of settling differences. I feel sure that members of the board will find this to be true and therefore classify Joe Mulloy as a conscientious objector.

If you desire further information, please do not hestitate to call or write me.

Cordially yours,

(s) Carl Braden
Carl Braden,
Executive Director

CB:st

[Letters from State Board to "Judge" Ratliff and "U.S. 6th District Court" Dated October 24, 1967]

(Stamped)
Local Board No. 47
Jefferson County
OCT 25 1967
Louisville, Ky. 40203

STATE HEADQUARTERS FOR SELECTIVE SERVICE
COMMONWEALTH OF KENTUCKY
220 Steele Street
Frankfort, Ky. 40601

October 24, 1967

Judge Ratliff
Pike County Court
Pikeville, Kentucky

Subject: Joseph Thomas Mulloy
SS No. 15-47-44-153

Dear Sir:

Subject registrant states he is under a $250.00 bond to the Pike County Court on the charge of flourishing a deadly weapon. Please advise if case is still pending.

Mr. Mulloy is subject to induction into the Armed Forces of the United States, but cannot be inducted if he is under the jurisdiction of the Court.

Sincerely,

For the State Director
(s) H. L. B.
Henry L. Bethel, Jr.
Lt. Colonel, AGC
Chief, Field Operations Division

cc: L. B. 47

(Stamped)
Local Board No. 47
Jefferson County
OCT 25 1967
Louisville, Ky. 40203

STATE HEADQUARTERS FOR SELECTIVE SERVICE
COMMONWEALTH OF KENTUCKY
220 Steele Street
Frankfort, Ky. 40601

October 24, 1967

U. S. 6th District Court
Pikeville, Kentucky

Subject: Joseph Thomas Mulloy
SS No. 15-47-44-153

Dear Sir:

Please advise if subject registrant is still under the jurisdiction of the Court, or if he has been released.

Mr. Mulloy is subject to induction into the Armed Forces of the United States, but cannot be inducted if he is under the jurisdiction of the Court.

Sincerely,

For the State Director
Henry L. Bethel, Jr.
Lt. Colonel, AGC
Chief, Field Operations Division

cc: L. B. 47

[Letter from United States District Court to State Headquarters Dated October 26, 1967. Received by Local Board December 6, 1967]

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
Office of the Clerk

(Stamped)
Local Board No. 47
Jefferson County
DEC 6 1967
Louisville, Ky. 40203

October 26, 1967

State Headquarters for Selective Service
Commonwealth of Kentucky
220 Steele Street
Frankfort, Kentucky 40601

Attn: Lt. Colonel Henry L. Bethel, Jr.
AGC Chief, Field Operations Division
Re: Joseph Thomas Mulloy
SS No. 15-47-44-153

Dear Sir:

The above named subject was recently a plaintiff in a civil action filed on our Pikeville docket. I have no information of his ever being a defendant in a matter in this Court either civil or criminal.

Very truly yours,
(s) Davis T. McGarvey
Davis T. McGarvey, Clerk
U.S. District Court

DTM:nca

This letter has been at Ky. St. SS Hdqts and just received by this Board (Bd 47) on Dec. 6, 1967,

(s) M. Green
Clerk
Witnessed by Mrs. F. Brown

[Letter from Joseph Thomas Mulloy to Local Board
Dated October 26, 1967]

(Stamped)
Local Board No. 47
Jefferson County
OCT 30 1967
Louisville, Ky. 40203

Oct. 26, 1967

Selective Service
Local Board No. 47
Louisville, Ky.

Dear Sir,

Just a few notes to bring you up to date.

1, My lawyer informs me that I am still under bond to the Federal Court in Lexington.

2, Enclosed is my CO application

3, I request a personal interview with my board to discuss my appalachian

thank you,

(s) Joseph Mulloy
Joseph Mulloy

[Letter from Local Board to Joseph Thomas Mulloy
Dated October 30, 1967]

October 30, 1967

Mr. Joseph Thomas Mulloy
Rt. 2 Box 928
Pikeville, Ky.

Your appeal rights and personal appearance time has lapsed. However the Board members are granting you a personal appearance, simply through courtesy. A Board meeting is to be held Thursday, Nov. 9, 1967 at 1:30 p.m.

Yours truly,

Local Board 47

(Miss) M. Green
Clerk

[Letter from Thorsten Horton to Local Board
Dated October 27, 1967]

October 27, 1967

Thorsten Horton

Box 2533
Pikeville, Kentucky

Kentucky Local Board Number 47
Selective Service System
1405 West Broadway
Louisville, Kentucky

Re: Mr. Joseph Mulloy, Box 928, Route No. 2, Pikeville, Kentucky

Dear Sir:

Mr. Mulloy has asked me to be a reference for his sincerity in requesting status as a conscientious objector.

I met Joe Mulloy in the Fall of 1966 in connection with developing a field study project in Southern Appalchia for college students. From this first meeting until the present time, including his experience in the courts involving sedition charges, I have observed in Joe Mulloy what I would call genuine Christian love and concern for the Christian brotherhood of Man. In my estimation, Joe could not have endured the persecution he received related to his court experience if he had not had faith in the goodness of Man.

In the recent encounter involving the Appalachian Group to Save the Land and People and the Puritan Coal Company,

Joe Mulloy demonstrated his belief in nonviolence by convincing members of the Appalachian Group to leave their arms at home, thus avoiding what could have been a terrible waste of human life.

Please feel free to write or call–(606) 432-3189.

I sincerely hope that you will honor his request.

Sincerely,

Thorsten Horton
Director of the Appalachian Field Study Center (A Project of the Union for Research and Experimentation in Higher Education)
Visiting Instructor at Pikeville Coll.

TH/mh

[Letter from William F. Browne (Rev.) to Local Board. Dated October 30 1967]

Saint Anthony's Church
Norton, Virginia 24273

St. Mary's Church
Coeburn, Virginia

St. Joseph's Church
Clintwood, Virginia

October 30, 1967

Local Board No. 47
1405 W. Broadway
Louisville, Kentucky

Re: 15-47-44-153

Dear Sirs:

This letter is a request on the behalf of Joseph T. Mulloy. I request that you consider his position that he finds participation in war as morally offensive to his conscience and therefore be granted a classification as a conscientious objector.

I am personally acquainted with Joseph T. Mulloy and can attest to his moral integrity and veracity. His personal conscience finds that participation in war is incompatible with his moral convictions, consequently, military service would do violence to his conscience.

The Catholic Church has always maintained that participation in a just war is morally defensible. However, moral

theologians and the Church, in particular, has always insisted that each individual must follow his own conscience. This is the basic moral principle in Catholic moral theology. Consequently, even in view of overwhelming approval in a given moral consideration the Church has always respected the convictions of the individual conscience.

In view of my personal association with Joseph T. Mulloy and our Church's defense of the inviolability of the individual's conscience, I request that you grant the registrant a draft classification as a conscientious objector.

If further clarification is necessary in this matter I will be happy to appear personally before your Board to answer any questions.

Respectfully yours,

(Rev.) William F. Browne

[Letter from Edith Easterling to Local Board Dated November 2, 1967]

(Stamped)
Local Board No. 47
Jefferson County
NOV 9 1967
Louisville, Ky. 40203

Nov. 2, 1967

Selective Service System

I have known Joe Mulloy for almost wo years. We have worked together in Pike County trying to bring democracy to Eastern Kentucky. We have had a hard struggle and it is, of course, not over yet. We have been called every thing and threatened but we believe in the power of the people and will continue. Joe Mulloy has played a very important part in helping us with our rights and to get organized. He would be impossible to replace if he were to have to leave here.

I have also talked often with him concerning the acts of violence in this country and know him to be a peaceful man. He has always encouraged us that we must organize peacefully. When the buldozers were about to strip Jink Ray's land Joe cautioned the use of non-violence. The usual way of settleing things here is with a shot gun but this time the peaceful way worked. He has demonstrated the sincereity of his belief to us.

I hope that you defer Joe so that he can continue to work here in the war for democracy.

Yours,

(s) Edith Easterling
Edith Easterling
Field Director for Pike County
Appalachian Volunteers, Inc.
Box 356 M Rt. 2
Pikeville, Ky.

[Letter from Robert Joseph Mulloy to Local Board
Dated November 7, 1967]

(Stamped)
Local Board No. 47
Jefferson County
NOV 9 1967
Louisville, Ky. 40203

November 7, 1967

Selective Service
Local Board # 47
1405 West Broadway
Louisville, Kentucky

Subject: Joseph T. Mulloy

Gentlemen:

I am writing this letter in behalf of my brother, Joseph T. Mulloy.

It is my understanding that Joseph T. Mulloy has requested, of Local Board #47, a draft classification referred to as conscientious objector.

Insofar as I am a veteran of the Korean War, and vehemently disagree with my brother's unwillingness to bear arms for his country, it should be noted, however, that I believe my brother to be sincere concerning his feelings and he has maintained this position for a number of years.

Respectfully yours,

(s) Robert J. Mulloy
Robert J. Mulloy
6104 Oaknoll Drive
Louisville, Kentucky 40219

(Stamped)
Local Board No. 47
Jefferson County
NOV 9 1967
Louisville, Ky. 40203

6104 Oaknoll Dr.
Lou. Ky. 40219
10-24-67

Dear Joe:

I have been thinking about you and thought I would write.

Joe, we are certainly proud of you concerning your attempts to correct certain social injustices in Pike County.

Also, we are pleased with the outcome of the alleged sedition charge.

Mom was telling me that you are considering the possibility of being classified as a conscientious objector with regard to your draft status.

Joe, I wish you wouldn't take this approach to your military obligation. I see no reason why you should not bear arms for your country. If we all believed the same way you do, and refused to bear arms, our country would have long ago been lost to another and less free form of government.

I am sure you could recite many valid arguments to the contrary, but nevertheless, you have certain obligations to your country, and of equal importance, to your family.

I would not be reluctant to say that I, for one, would be most embarrassed if you insisted on not being inducted.

Give Karen my regards.

Bob

[Personal Appearance Meeting Dated November 9, 1967]

M-40

Registrant:

Joseph Thomas Mulloy SS Number: 15-47-44-153

RECORD OF PERSONAL APPEARANCE

1. Was written Request for Appearance filed? Yes
2. Date of Local Board Meeting Nov. 9, 1967
3. Names of board members present:
   Mr. J. A. Sherman Mr. Frank Wolking
   Mr. Robert Downs
4. Names; Identification of parties appearing:
   Joseph Thomas Mulloy
5. Requesting change in classification from to until
6. Was written information filed? Yes.
*7. Following is a concise summary of oral information as reported by parties appearing:

Mr. Mulloy was granted a courtesy personal appearance, since his time for personal appeal and appearance had expired.

Registrant sworn in.

Registrant advised that he was claiming a C.O. classification because he had learned through experience and did not until later in life realize the importance of now believing as he did. He felt that military service would interupt his work and there would be no one else to take his place.

He is under bond as long as his appeal time is running.

Miss Green to write to Judge Monyhand U.S. . . District Co., Lexington Ky. to find out about appeal and bond. Until such time as a reply is received the Members would not

consider him as a C.O.

I certify that the information shown in Item 7 above was submitted verbally by the person(s) listed in Item 4.
This 9 day of November, 1967.

(s) M. Green
Clerk, Local Board No.

*Reverse side of sheet or additional sheet of plain paper may be used to complete summary, if needed.

[Letter from Joseph Thomas Mulloy to Local Board
Dated November 12, 1967]

Nov. 12, 1967

Selective Service
Local Board No. 47
Louisville, Ky.

Dear Sir:

I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.

These are certainly troubled times in this country. There are millions of black people and poor white people who have never had a say about any thing they are beginning to organize. They are beginning to organize for freedom and equality, the two great principles of the Bill of Rights. But this struggle is hitting head on the capitalist ruling class that has disregarded our Constitution for the profit motive. I believe that another revolution is beginning to take place in this country, that this country's government can no longer deal with its internal problems.

I of course hope that this revolution takes a non-violent form. It is important that men begin now to understand each other. That is why I hope that you understand me. You have me over the barrel, so to speak, in that you have the law behind you. But I remind you that I am an organizer. That I have dedicated my life to change and to the constant struggle that is democracy. There is nothing that can stop me

from organizing against something I don't believe.

This brings us to the war in Vietnam and my draft situation. I do not question individual integrety or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.

I told you I felt that I was serving my country's needs here in Pike County. That was no frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think.

I know that I will eventually face prison. I am not afraid of that. Greater men than I have pulled time for practicing what they believe. When Emerson visited Thoreau in jail for not paying taxes to the Mexican War he asked "What are you doing in there?" Thoreau answered "What are you doing out there?"

It is a sad time but what must be must be. Before now I have not done any draft organizing. I have restricted myself to work with the dispossessed coal miners of Appalachia. But I believe it to be the same battle.

I submit this to you representing the government with all due respect,

Sincerely,

Joseph Mulloy

[Letter from Joseph Thomas Mulloy to Local Board Dated December 2, 1967]

(Stamped)
Local Board No. 47
Jefferson County
DEC 4 1967
Louisville, Ky. 40203

Dec. 2, 1967
Box 928 Rt. 2
Pikeville, Ky.

Selective Service
Local Board # 47
Louisville, Ky.

Dear Sir:

This is to inform you that I am no longer employed by the Appalachian Volunteers. I was fired today for stating that I am a C O and would refuse induction if ordered.

I feel very bad about being fired but a person must have the conviction of his beliefs. Please consider this as a public demonstration of my C O convictions.

As far as I know I am still under bond to the Federal Court.

I am anxiously awaiting your decision on my case.

Sincerely,

(s) Joseph Mulloy

[Letter from Joseph Thomas Mulloy to Local Board Dated January 3, 1968]

(Stamped)
Local Board No. 47
Jefferson County
JAN 4 1968
Louisville, Ky. 40203

Jan 3, 1968
1301 Cherokee Rd.
Louisville, Ky.

Selective Service
Local Board # 47
Louisville, Ky.

Dear Sir,

This is to inform you of my new address noted above.

I am now employed by the Southern Conference Educational Fund in Louisville. My work includes developing educational materials for bringing the poor and the middle class to a better understanding of the issues that affect their lives. This includes an understanding of local taxes, open housing laws, redistribution of the wealth and U. S. domestic and foreign policy.

I'm also working on a book about my experiences with the Poverty War in Appalachia.

Charges of "sedition" have been dropped against me and the bond have been released. I am unsure if the Pike County peace bond has been dropped, but suspect that it has since I no longer live there. I am still awaiting word from my lawyer on that charge.

Sincerely,

(s) Joseph Mulloy
Joseph Mulloy

[Letter from Local Board to Joseph Thomas Mulloy Dated January 19, 1968]

January 19, 1968

Mr. Joseph Thomas Mulloy
1301 Cherokee Rd.
Louisville, Ky.

Mr. Mulloy:

The members reviewed your file at a meeting Jan. 11, 1968 and they felt that the information in your file did not warrant a re-opening of your classification.

Yours truly,
Local Board 47

_____

(Miss) M. Green
Clerk

[Letter from Joseph Thomas Mulloy to Local Board Dated January 21, 1968]

Jan. 21, 1968
1301 Cherokee Rd.
Louisville, Ky.

Selective Service
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Clerk:

I appeal your failure to reclassify me I-0, I consider the interview in November a re-opening of my case.

Please forward this appeal to the proper level.

Sincerely,

Joseph Mulloy

cc: State Director
Selective Service
Frankfort, Ky.

[Letter from Local Board to Joseph Thomas Mulloy
Dated January 23, 1968]

January 23, 1968

Mr. Joseph Mulloy
1301 Cherokee Road
Louisville, Ky.

Dear Mr. Mulloy:

The personal appearance that the Board Members granted you was a courtesy personal appearance, since your time for granting a personal appearance and appeal had lapsed. The Board Members do not consider this a re-opening of your case.

Yours truly,
Local Board 47

_____
(Miss) M. Green
Clerk

[Transcript of Proceedings, Mulloy v. Selective Service Local Board No. 47, et al., February 16, 1968]

TESTIMONY OF J. ALLEN SHERMAN

[26]

MR. J. ALLEN SHERMAN, called as a witness by the plaintiff as if on cross examination, after first being duly sworn, testified as follows, to-wit:

CROSS EXAMINATION BY MR. ROBERT A. SEDLER

* * * * * * *

[28]

MR. SEDLER: Mr. SHERMAN, you are Chairman of Local Board 47?

MR. SHERMAN: That's right.

* * * * * * *

[38]

Q. Now, on this—this hearing, courtesy interview, was held November 9th, lasted about ten to fifteen minutes, is that correct?

A. It didn't last so very long, no, sir.

Q. And what action was taken by the Board at the conclusion of the hearing?

A. The hearing—we had Mr. Mulloy come in and we asked

him to express himself as to what reasons he had and what he had written out before he came in. We read over his file. We read over his forms that were in the file as far as we could. Then we had him come in

[39]

and express himself. The Board members then asked some questions of him, as I remember it. It's pretty far back, and it's not transcribed or taken down. And then, at the conclusion of it, I always ask them if there is anything additional that they care to add. And I'm sure I asked that of Mr. Mulloy and he went outside.

We then had him sit down and wait, I believe–I'm not certain about that; it's generally the procedure, though–and we discussed his case in there at that time and came to the conclusion that there wasn't any merit to his contention of the–

Q. (Interrupting) Conscientious Objector Status?

A. (Continuing)–Conscientious Objector Status that he was seeking.

Q. How many–

A. (Interrupting) His principal statement to us in there was in relation to his work and the importance of his work in the mountains of Eastern Kentucky.

Q. Let's see if we can't recall that interview a little more fully.

A. Miss Green generally makes some notes on the interview.

[40]

Q. Well, I have some questions that I would like to ask you–

A. (Interrupting) Yes, sir.

Q. (Continuing)–if these were questions that were asked.

Was Mr. Mulloy asked, "How did you develop your conscientious objector beliefs?"

A. I don't know what you are reading from. But I don't

know—wouldn't remember any particular or specific question that was asked at that time.

Q. Do you recall that the question—a question was asked, generally, such as, "Why didn't you file for Conscientious Objector Status earlier"? Do you recall Mr. Mulloy having been asked that?

A. No, sir. I don't recall no specific questions.

* * * * * *

[41]

Q. Was a question—do you recall a tenor of a question asked, "Aren't you just filing to get out of the draft"?

A. I don't recall any specific question. But I'm certain that is never asked and wasn't asked on this occasion, either.

Q. Okay. Was he—do you recall the question being asked, "Do you feel any obligation to your country"?

A. No. I'm sure that that wasn't asked. It's never asked. And, while I don't recall any specific question, I will say that—a question of that sort or that type or that inference is never asked of any registrant.

Q. At that time—how much time did the Board give to consider Mr. Mulloy's claim at that time, the November 9th, how much consideration was given?

A. I don't know whether you mean deliberation after Mr. Mulloy left the room—

Q. (Interrupting) Yeah; after he left. After he left.

A. I would say it wasn't a great length of time. We all were familiar with his file, had looked it

[42]

over before he came in, had listened to him to see if he had any merit, or any difference, or changed his position. Principally it was the same deal, that he was seeking occupational deferment from what his testimony was—

Q. (Interrupting) Your conclusion was then and was now—

A. (Interrupting) If you will let me finish–

Q. (Interrupting) And you–

A. (Interrupting) I'll tell you that the time that it took wasn't very long. No more than eight or ten minutes, I would say.

Q. Just about–just about ten minutes on the evening of November 11th?

A. Well, I believe it was the 9th.

Q. Ninth; I'm sorry.

A. I don't remember. But whatever evening it was.

Q. Ten minutes on the evening of November 9. And at that time–at that time was a decision made as to whether or not this would be accepted?

A. What would be accepted?

Q. In other words, was a decision made on November 9th as to whether or not the Board would reopen

[43]

the classification? Did you make a decision that night?

A. That's right, that there was no justification, that it was the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration.

Q. So, you made a decision on November 9th?

A. The Board made a decision.

* * * * * * *

[44]

Q. Was Mr. Mulloy notified of your decision, as required by law?

A. I couldn't answer that, when he was notified other than what the record shows. Miss Green handles the notification.

Q. The record shows some very interesting things.

The record shows that on January 11, 1968, the following information:

"All information in file was considered, including claim of conscientious objector. All members

[45]

present felt this information did not—did not warrant reopening of 1-A classification."

Would you tell me if a—since a final decision was made, so you say on November 9th why was the matter further considered at the meeting of January 11?

A. I don't know that it was further considered. That may have been the date it culminated. Actually, at the time of his hearing, I don't know now whether he was under indictment or not. If he was, then the appeal time had not as yet run and we understood from the Regulations that nothing, no action could be taken in the order of induction of a registrant so long as he's either under indictment or the appeal time has not elapsed or for anyone to appeal the case.

* * * * * * *

RECROSS EXAMINATION

* * * * * * *

[63]

Q. You said that the hearing was directed toward understanding what Mr. Mulloy was claiming, is that correct?

A. The type of hearing, the courtesy hearing, we gave Mr. Mulloy was an opportunity to come in and explain his position as to what his position was, what he was trying to do and how he arrived at it.

Q. Was his position not sufficiently stated in the completed SS Form 150?

A. It didn't—Mr. Mulloy asked for a

[64]

personal hearing, which we told him we'd be glad to talk to him. He wasn't entitled to it under the Act, but we'd be glad to have him come in and try to explain his position or elaborate on it, which is what he wanted. When he came in, the whole time, as I remember, he was talking was about his job—was about his job, his occupation, the work he was doing.

Q. Is it your position that the statements that Mr. Mulloy made in SS Form 150 and the statements that he made on the interview and the supporting letters that were sent, even if true, would not justify a reopening of his classification?

A. Taking everything that he—he did not make out—his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.

Now, I went over his 150 Form. What's in it, now, I couldn't tell you. I don't know. And I don't know what's in the other registrants' file. His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.

[65]

Q. Then you based—then are you saying that you based your decision not to reopen on the testimony he gave at the oral interview rather than the answers he gave on SSS Form 150?

A. We try to base all our decisions on all the information available, including the file and what he says.

Q. Is it your position, then, that on all the information available, that is, his testimony at the hearing, SS Form 150 and whatever other information you had in his file, he did not make out a prima—a case for Conscientious Objector Status?

A. I didn't follow you on your whole question.

Q. Is it your position that on all the information that you have, that is, his testimony at the hearing, his answers on SS Form 150 and other information in his file, this did not make out a case that he was entitled to a deferment?

A. Well, I think the file speaks for itself. The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished to us, the letters he had sent in with his 150 Form and the information that he had given when he appeared in person.

Q. And that all of this, even if true, would not have entitled him to have his classification reopened?

[66]

A. All the information that we had, we came to the conclusion as we recorded on the file.

Q. Thank you. That's all.

A. Yes, sir.

(WITNESS EXCUSED)

[Transcript of Proceedings, U.S. v. Joseph Thomas Mulloy, April 5, 1968]

TESTIMONY OF MRS. MARGARET GREEN

[38]

MRS. MARGARET GREEN, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows, to wit:

* * * * * * *

CROSS EXAMINATION BY MR. SEDLER

* * * * * * *

[52]

Q. Now, when a registrant is classified as 1-0, that is, Conscientious Objector, he receives does he not, an order to report for civilian work; is that correct?

A. After certain procedures.

BY THE COURT: Well, what are these procedures; do you recall?

[53]

THE WITNESS: Well, he must appear before the Board and it is necessary for us to have a representative from our State Headquarters and he is offered various kinds of jobs such as working in various hospitals and we send the registrant this list and he makes his selection and then we send it back to Headquarters.

Q. So that a registrant who is classified as 1-0 then has a

special proceeding before the Board?

A. That's right.

Q. At which time he then receives an order to report for civilian work?

A. That's right.

Q. Do you recall any such proceedings with–

A. (Interrupting) I have never had one in my Board.

Q. You have never had one in your Board?

A. (Witness shook in the negative.)

Q. Where a registrant was ordered to report for civilian work?

A. No, I have not.

MR. SEDLER: Thank you; no further questions.

* * * * * * *

TESTIMONY OF ROBERT T. DOWNES

[92]

MR. ROBERT T. DOWNES, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * *

[94]

Q. At the time, or I should say prior to the time of the meeting, this was the first time that you were aware of Mr. Mulloy?

A. I had never met him.

Q. You had never met him. Were you aware that he was a registrant of your Board?

A. No.

Q. No. Prior to the meeting did you read his file, his Selective Service file?

A. The file is available before he presented himself, yes.

Q. And you read it?

A. I scanned it because I am the newest member on this particular Board and I was not familiar with what was in his file at all.

Q. You weren't. You just scanned the file then?

A. (Witness nodded his head in the affirmative.)

Q. When a registrant claims classification as a Conscientious Objector he must complete SS Form 150, must he not?

[95]

A. I believe this is the procedure, yes, sir.

Q. Do you know if, when you went through Mr. Mulloy's file, did you find that he had completed the SS Form 150?

A. I couldn't say.

Q. You don't remember that?

A. No, because as I recall his file was fairly thick.

Q. Fairly thick.

A. And I'm not familiar with the various forms by the particular numbers.

Q. Well, you knew though that applicants for Conscientious Objector status must complete a special form; is that correct?

A. Yes.

Q. Did you read, then, the form that he had filled out, his form for classification, as a Conscientious Objector?

A. I don't remember.

[96]

Q. During the time that you have been a member of the

Board do you recall how many requests for Conscientious Objection status have been made before the Board?

A. Except in a general way, there have been very few.

Q. Have you—do you recall any of these requests having been granted?

[97]

A. A change in status?

Q. No, given the status of a Conscientious Objector, a 1-O classification?

A. I don't recall of any.

Q. You don't recall of any of that being—any of that being done?

A. No.

Q. Do you recall the interview with Mr. Mulloy on November 9th?

A. Yes, I remember that he did appear before the Board.

Q. He did appear. You don't remember if you had read his file before he appeared?

A. I did not read each sheet in his file; the file was there.

Q. You don't remember if you read his answers to the form required by conscientious objectors; is that right?

A. That's correct.

Q. Did you feel that you could make a judgment without having read thoroughly his answers to the form?

A. There was no judgment required at this particular time.

[98]

Q. Oh, so that no judgment was made on November 9th; is that correct?

A. No, I—you asked if I had read the file before he appeared.

Q. Oh, well, you did read it that evening while he was—

A. (Interrupting) No, at the time the Board met the file was there and there were several members of the Board present at this particular time and the clerk had informed us that we had a person who had requested to appear before the Board.

Q. So, this was the first time you knew of this?

A. Knew of what?

Q. That Mr. Mulloy was trying to be claiming status as a Conscientious Objector?

A. Yes, and—

Q. (Interrupting) And—I'm sorry; continue.

A. And at that time, the clerk said that the individual was waiting—was there, and all of the Board members, I believe, or those who cared to looked in the file, but as far as reading each separate sheet is concerned, I don't believe that I did this.

[99]

Q. We are not concerned about each special sheet. I am concerned about what we call the SS Form 150 which is the special form for Conscientious Objectors that all applicants for this status must complete. You don't recall reading that?

A. Not specifically.

Q. Not specifically. How long did the interview last with Mr. Mulloy that evening; do you recall?

A. It's a fairly short time.

Q. About ten mintes?

A. I'd say ten, fifteen minutes, something like that; something in that neighborhood.

Q. Ten, fifteen minutes; and did you ask Mr. Mulloy any questions at that time?

A. As I recall, Mr. Mulloy did all of the talking.

Q. Mr. Mulloy did all of the talking and you didn't ask him any questions?

A. No, I don't recall that I did.

* * * * * * *

[103]

Q. Very well; you were aware Mr. Mulloy was seeking to be classified as a Conscientious Objector; is that correct?

A. On the basis of what he submitted to the Board when he

appeared before us.

Q. Yes, and you understand—you are thoroughly familiar with the law—let's say with the regulations governing the classification of Conscientious Objectors?

A. I can't say that I'm thoroughly familiar. As indicated to you before, I am perhaps the youngest person on the particular Board. I don't know whether this pertains in this

[104]

case or not, but ordinarily when the meets we go through whatever the cases are that are before us, what is presented, and then we act on this but I could not quote to you in terms of—

Q. (Interrupting) I don't mean to quote; I would just like a general—if you have a general understanding of what a conscientious objector is and the policy of your draft Board concerning conscientious objectors?

A. In a general sense, yes.

Q. Would you tell us what this is?

A. Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity.

Q. Well, the draft Board has to make that decision, doesn't it? He can't do it just on his own.

A. The draft Board, I thought now, was involved primarily with determining the availability of people.

Q. So that you don't think it was the draft Board's responsibility to determine whether a man is—

A. (Interrupting) Well, this is—

BY THE COURT: (Interrupting) Just a moment now, gentlemen. We are beginning to get away from it now. You have a perfect right now, of course, to prove by any draft Board member that he acted arbitrarily or capriciously or unfairly.

Now, the Court cannot allow you to cross examine a draft Board member on the contents of the law or its application. So, please confine your questions.

MR. SEDLER: Very well, Your Honor.

[107]

Q. Had you, prior to the January 11th meeting, read Mr. Mulloy's file thoroughly?

A. No.

Q. Had you, prior to that time, read the answers that he gave to the Selective Service form for Conscientious Objectors?

A. As I mentioned earlier, I cannot specifically state that I read all of the forms in his file.

Q. I didn't ask for all of the forms. I asked for crucial forms.

A. I'm trying to recall what possibly is on this particular form. As I said before, I do not remember the specifics of the form that you are questioning me about.

Q. Would it be helpful if I were to give

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you a copy or if we were to see the copy of that form in the record?

A. It might be.

MR. SEDLER: Can we agree to let him see the copy in the record?

MR. HUDDLESTON: Certainly; I believe the Judge has the file.

Q. Now, I show you this part marked as an appendix to the special form for Conscientious Objectors.

MR. HUDDLESTON: Your Honor, we ask that the witness be allowed to see the whole form and not just the—

BY THE COURT: (Interrupting) Yes, the witness may see anything he would like to see.

MR. SEDLER: The file is right there for the witness.

THE WITNESS: I remember reading this.

Q. You do remember reading it?

A. Yes.

Q. Do you also recall—well, let me put it this way; you

would say that after you finished reading that you concluded that this did not warrant then

[109]

a reopening of the classification?

A. I feel certain that this was one of the things that prompted me to feel this way.

* * * * * * *

Q. How much time would you say that you spent reviewing Mr. Mulloy's file prior to the January 11th meeting?

A. I don't know; the only—

Q. (Interrupting) Ten minutes?

A. The only time that I would have had an occasion to

[110]

even consider the file would have been during one of the Board meetings or before the meeting started.

Q. Before the meetings; in other words, you wouldn't take it home and study it carefully?

A. No.

Q. Now, you are prepared to state under oath, that you feel that you gave full and fair consideration to his claim; is that correct?

A. I believe so, on the basis of what was discussed, what we were able to glean from his own statements.

* * * * * * *

TESTIMONY OF FRANK J. WOLKING

[122]

MR. FRANK J. WOLKING, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * *

[123]

Q. Prior to the meeting of November 9th did you go through his file?

A. If his file came up I went through his file, but I wouldn't recall having specifically gone through his file.

Q. You wouldn't recall. Well, you knew his case was coming up?

A. I knew his—I knew he was coming to visit, coming to the Board for a hearing.

Q. Did you know that he had requested a reopening of his classification so that his claim for Conscientious Objector status could be considered?

A. I knew that Mrs. Green, the Board's secretary, had told us that he had asked for a courtesy hearing and it wasn't a regular hearing, but he wanted to come and make some statements and that's all I knew.

Q. So, you did not know at that time that he was acting for Conscientious Objector classification?

A. No.

Q. Then you did not go, prior to the hearing, read

thoroughly his responses to the SS Form 150?

[124]

A. I would say I absolutely did, but I wouldn't recall having done it.

Q. But if you did—

A. (Interrupting) If his case came before the Board I would have read whatever was in the Form 150.

Q. The Selective Service Form 150?

A. That's right.

Q. And your conclusion after reading—how much time did you spend on that form, would you estimate?

A. I wouldn't recall that.

Q. Your conclusion after reading that form was that this did not entitle him to a reopening of his classification?

A. That is correct.

Q. How long did the interview last at that time?

A. I wouldn't recall that either; possibly ten or fifteen minutes.

Q. About ten or fifteen minutes; and what questions—do you recall what questions you asked Mr. Mulloy that evening?

A. No, I don't think that I asked him any questions and I don't remember any.

Q. You don't think you asked him any questions?

[125]

A. I don't think I did.

Q. Do you recall any members of the Board asking him any questions?

A. No, I don't.

Q. Well, you mean that the meeting just started and he sat down and he said his piece for ten minutes and he left?

A. It is possible that some of the Board asked him questions, but I don't remember them.

Q. You don't recall any of the questions. Do you recall the substance of what Mr. Mulloy had stated that evening of November 9th?

A. The only recollection I have is that he stated that he felt like his work in Appalachia was very important and was at least important to him and he felt like he should be made a Conscientious Objector or should have Conscientious Objector status because of that, and that was all I—

Q. (Interrupting) Oh, in other words, you're saying that he was asking for an occupation deferment, a 2-A classification?

A. That's right.

Q. Oh, I see. In other words, he was not

[126]

then asking for a 1-0 classification?

A. I don't know what he was asking for or don't recall what he was asking for. The record will show what he was asking for, but I recall that that was his appeal; it was based on his work in Appalachia.

* * * * * * *

Q. And that he had not been convicted of any offense and at that meeting you reconsidered the case; is that correct?

A. I don't say we reconsidered the case. We just considered his—his statement that he had made when he came and asked for this when we had this hearing.

Q. Also you considered those statements at the meeting of the 9th, but the meeting of the 11th where you—or did you consider it at both times?

A. I would say, of course, we considered them at the meeting of the 9th because he made his statements then. You couldn't help if you were listening to a man making an appeal, you couldn't help considering it while you were there.

Q. But you did not make a decision on the 9th?

A. I don't remember whether we actually did or did not on the 9th.

Q. But the minutes show that the final decision was made on the 11th.

A. Then that is correct.

Q. And you are then prepared to state

[129]

under oath that you feel that you gave full and fair consideration to his claim?

A. Oh, yes.

Q. And that everything he said and all of the evidence he produced even if true, would not entitle him to the classification that he claimed?

A. That is the way I felt and that is the way I voted.

MR. SEDLER: No further questions.

CROSS EXAMINATION

BY MR. HUDDLESTON:

Q. As I understand it then, you did not inquire into his sincerety [sic], but the prima facie case that he presented?

A. That is quite true.

Q. Assuming that he was sincere?

A. We assumed he was sincere, that's right.

Q. You stated that he talked about or based his claim on the importance of his work in Appalachia?

A. That is the impression I have or that is the impression I remember.

[130]

Q. He was asking for a Conscientious Objector status because he had important work in East Kentucky?

A. That's right.

* * * * * *

REDIRECT EXAMINATION BY MR. SEDLER

* * * * * *

[136]

Q. Now, if an individual makes this statement and the Board agrees with him, that is, it finds as a fact that he is by reason of his religious training and belief conscientiously opposed to participation in war in any form and further, conscientiously opposed to participation in noncombatant training and service in the Armed Forces, what happens?

A. How do you mean what happens?

Q. What classification does he get?

A. Well, if the Board doesn't consider this he stays in this 1-A.

Q. Now, if the Board considers it favorably, what classification does he get? If the Board considered Mr. Mulloy's claim favorably, what classification would he have been given?

A. (No response)

Q. Well, what classification would he be given?

A. I believe I'm correct in stating that he would be offered a position in some hospital or some work that would permit him to serve in some other manner.

Q. Right, so that by signing this statement then Mr. Mulloy would have indicated his willingness to perform civilian

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service in the national interest?

A. Well, I believe it says he wouldn't, doesn't it? Isn't that correct?

A. I therefore claim exemption from both combatant and noncombatant training and service in the Armed Forces.

Q. Right, and you say that if he is exempt from noncom-

batant and combatant services from the Armed Forces he spends two years working in a hospital or something, right?

A. I think sometimes they are offered that.

Q. In other words, you don't think the law requires that of one who is given a C.O. status, in other words you—you think—in other words, you thought that if you granted Mr. Mulloy his claimed classification that he would have avoided the national service entirely; is that correct?

MR. HUDDLESTON: Your Honor, I don't believe that this is—

BY THE COURT: (Interrupting) I'll sustain that.

[138]

Q. Was it your understanding that—is it your understanding that a conscientious objector must perform two years of service in the national interest?

A. The only thing I can say in this case is that I didn't believe that he sould [sic] be granted a Conscientious Objector status. That is what I believed and that is the way I voted. We didn't vote on anything else.

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* * * * * *

THE WITNESS: I mean everything that was in the Form 150 and everything he said, in other words, everything was taken into consideration in the record and that's what my decision was based on.

Q. And that even—in other words, you did not question his sincerity, I take it?

A. That is correct.

Q. You believed his sincerity—you believed that everything he said, even if true, would not entitle him to be a conscientious objector?

A. Everything that was in the record and what he said.

* * * * * *

TESTIMONY OF ROBERT H. RICKERT

[141]

MR. ROBERT H. RICKERT, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * *

Q. When did you first become aware that Mr. Mulloy was registered before your Board?

A. When he was registered.

Q. Yes. When did you identify—when did you know that a fellow named Mulloy was a registrant before you?

A. Possibly it was called to my attention on the 11th, the second meeting, in January.

Q. Oh, then you were not at the meeting of November 9th when Mr. Mulloy was—

[142]

A. (Interrupting) I was not at that meeting.

Q. Did you discuss the action at the meeting of November 9th with any members of the Board or with the clerk?

A. Only at meeting on January—in January.

Q. So that you were not aware prior to January 9th that Mr. Mulloy's case was going to come up that evening[sic]?

A. No.

Q. Oh, then you had not read his responses to the SS Form 150?

A. No.

Q. I see. Well, the record of minutes shows that at that meeting, the meeting of January 9th [sic] the Board voted four to nothing that his classification—that his classification should not be reopened, did you not at that time?

A. Yes.

Q. Well, how could you vote if you hadn't read his file?

[143]

A. I read his file at that day and I reviewed the case with the other members of the Board.

Q. I'm sorry; you read his file at what date, sir?

A. In January. I think it was the 11th.

Q. Oh, then you did read the file at the meeting or before the meeting?

A. Before the meeting.

Q. How much time did you spend on it?

A. Enough time to read it; I don't know.

Q. You don't recall. Do you recall that he did complete the SS Form 150?

A. I do.

Q. And you weren't at all troubled about voting on this even though you hadn't been present at the meeting of November 9th when he made a personal appearance?

A. No.

Q. Were you—in other words, it is fair to say that your decision was, in part, influenced by the views of the other members of the Board as to what he said that evening?

A. And reviewing the file, yes.

* * * * * *

[145]

REDIRECT EXAMINATION BY MR. SEDLER

Q. Let me ask you an additional question; you have stated that you had no personal feelings against Mr. Mulloy?

A. Right.

Q. Did you have any feelings against Mr. Mulloy due to the fact that he had asked for classification as a Conscientious Objector?

A. No, no more than any of the rest of the registrants who had asked for that.

Q. You say other registrants have asked for it?

A. At times, at different times, yes.

Q. Do you recall the last time that a registrant asked for that classification?

A. No, no.

Q. You do not?

A. No.

Q. Do you recall in your tenure of service that the Board has given anyone a classification as a Conscientious Objector?

A. Yes.

Q. But you don't recall the name of that individual?

A. No.

Q. And that—but this was done and this person was ordered to perform civilian work?

A. Yes.

* * * * * *

TESTIMONY OF J. ALLEN SHERMAN

[167]

MR. J. ALLEN SHERMAN, called as a witness, by the

defendant, having been first duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * *

[169]

Q. You have been on the Board since 1948?

A. Approximately.

Q. During that time—strike that.

Let me ask you this; what is your understanding of a conscientious objector?

A. My understanding of a conscientious objector—it's pretty much spelled out in the regulations, I believe, and my understanding of it would be one who has conscientious scruples against taking another person's life even under any circumstances.

Q. Does participation in war in any form—

A. (Interrupting) That's correct.

Q. Now, there is another classification is there not also, a class 1-A-0 opposed to the participation in combat, but will so perform noncombatant service?

MR. HUDDLESTON: Objection, this is inquiry into the law itself which is not a jury question.

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BY THE COURT: Well, I will let Mr. Sherman answer it if he can.

THE WITNESS: Repeat the question, please.

Q. The question is, I mean is there also not a classification of 1-A-0 where the person is opposed to participation in combat, but is willing to perform noncombatant military service?

A. I'm not certain about that, whether there is a special classification or not. I don't mean—I know many of them do perform that sort of a service within the Army themselves. Now, whether this is a classification for it under Selective Service or whether that is designated by the Army, I wouldn't be certain about that.

Q. But Mr. Mulloy did not ask for that; he indicated he was opposed to participation in war in any form.

A. That's correct, as I recall it.

Q. When a registrant is classified as a Conscientious Objector, opposed to participation in war in any form, what happens? What disposition is made of that if you would have granted the classification to Mr. Mulloy that he sought?

A. As a Conscientious Objector?

[171]

Q. Yes.

A. He'd be classified as a 1-A-0 classification. He would be given an opportunity to serve in some institution of his choosing for a period of, I believe it is two years which he would have the choice of making an institution within a given group.

Q. You testified that you have read—you had read Mr. Mulloy's file prior to the meeting of November 9th?

A. I reviewed his file at that meeting.

Q. At that meeting; you had not considered it prior to the meeting?

A. Well, I am sure his file came up for consideration on other matters prior to that time.

Q. Not his claim for Conscientious Objector status?

A. No, sir; that came up at that time. We looked it over before he came in as we do anybody else.

* * * * * *

[Order Granting Certiorari]

(Title Omitted in Printing)

Facts and opinion, 412 F.2d 421.

Jan. 19, 1970. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted and case placed on the summary calendar.

SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
SEP 25 1969
JOHN F. DAVIS, CLERK

October Term, 1969
No. 655

JOSEPH THOMAS MULLOY,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT ALLEN SEDLER
3461 Keithshire Way
Lexington, Kentucky 40503

Attorney for Petitioner

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REASONS FOR GRANTING THE WRIT 9

I. In holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification nor did it reopen his classification in fact, the United States Court of Appeals rendered a decision in conflict with the decisions of other Courts of Appeal on the question of when a board abuses its discretion in refusing to reopen and when it has reopened in fact. 9

II. Certiorari should be granted to review the holding of the Court below to the effect that the petitioner failed to make out a prima facie case for classification as a conscientious objector

because his opposition to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than religious training and belief," since in so holding, the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious belief 22

III. The holding of the Court below that the petitioner could be denied classification as a conscientious objector because his opposition to war was not based upon religious training and belief assumes that Congress may, consistent with the First Amendment, limit the conscientious objector exemption to those whose opposition to war is based upon religious training and belief. Certiorari should be granted, because this raises the same question as is raised in *United States v. Sisson*, which is currently before this Court 26

IV. This Court should grant certiorari to settle the question of whether the denial of the opportunity for full review of a claim for classification as a conscientious objector, including review by an appeals board, when such claim has been presented for the first time, constitutes a violation of due process of law as guaranteed by the Fifth Amendment 28

V – This Court should grant certiorari to consider whether the due process requirement of a full and fair hearing necessitates that a selective service local board in passing on a claim for classification as a conscientious objector read the registrant's file with some degree of care, particularly his SSS Form 150, and further that it possess a minimum understanding of the applicable statute and regulations in order to pass intelligently on said claim. 31

CONCLUSION 36

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

JOSEPH THOMAS MULLOY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 10, 1969, petition for rehearing denied on August 29, 1969.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A hereto, p. 1a. It affirmed a judgment of conviction of petitioner for failing to submit to induction into the armed forces of the United States in violation of 50 App. U.S.C. Section 462 (2). Petitioner was tried in the District Court by a jury and there is no opinion

of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 10, 1969, Appendix A, p. 1a, petition for rehearing denied on August 29, 1969, Appendix B, p. 12a. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Court below err in holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification under 32 C.F.R. Section 1625.4, nor did it reopen his classification in fact within the meaning of 32 C.F.R. Section 1625.2, so as to entitle him to an administrative appeal as provided in 32 C.F.R. Section 1625.13? In so holding did it err further in that it (1) applied the "basis in fact" test applicable to the judicial review of a board's final determination to the review of the board's determination that the petitioner failed to make out a prima facie case for reopening and (2) permitted the board to engage in evaluative consideration of all the information in the petitioner's file under the guise of determining whether the new information submitted by the petitioner, if true, would entitle him to the claimed classification, thereby obliterating any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial of the classification on the merits following a reopening under 32 C.F.R. Section 1625.2?

2. Did the Court below err in its conclusion that the petitioner did not make out a prima facie case for classification as a conscientious objector because his objection to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief" in that: (1) it failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to participation in war is, in part, based upon religious belief; and (2) even if his opposition to war was based upon non-religious beliefs, he was still entitled to classification as a conscientious objector, because Congress may not, consistent with the First Amendment, limit the conscientious objector exemption to those whose opposition to war is based on religious training and belief?

3. Does the fact that the petitioner was denied the opportunity for full review of his claim for classification as a conscientious objector, including review by an appeals board, when such claim was presented for the first time, constitute a violation of due process of law, as guaranteed by the Fifth Amendment?

4. Was the petitioner denied due process of law, as guaranteed by the Fifth Amendment, in that his claim for classification as a conscientious objector was not given full and fair consideration by his selective service local board, because the members of said board refused to give such consideration to his claim and/or because they lacked the competency and understanding of the applicable statute and regulations to pass intelligently on said claim?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall pass no law respecting the establishment of religion, or prohibiting the free exercise thereof;***"

Amendment V

"No person shall *** be deprived of life, liberty, or property, without due process of law ***."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Military Selective Service Act of 1967, 50 App. U.S.C. Sections 451 et seq. The relevant provisions are 50 App. U.S.C. Sections 456 (j), 462 (a). Because these provisions are lengthy, their pertinent text is set forth as Appendix C, p. 13a. The regulations involved are Selective Service Regulations, part 1625, 32 C.F.R. Ch. XVI. Because these provisions are lengthy, their pertinent text is set forth as Appendix D, p. 16a.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 App. U.S.C. Section 462 (a). A sentence of five years' imprisonment and a fine of $10,000 were

imposed. Petitioner had requested classification as a conscientious objector (Class 1-0), and the questions presented for review in this petition arise out of the stated refusal of his selective service local board to reopen his classification of 1-A and to consider on the merits his claim for classification in Class 1-0.

Prior to March 17, 1966, petitioner had been classified in Class 2-S (college student), and from that date until May 11, 1967, he was granted an occupational deferment to work with the Appalachian Volunteers, an anti-poverty organization working in Eastern Kentucky. On May 11, 1967, he was placed in Class 1-A, and he appealed from that classification. He was ordered to report for a physical examination on June 26, 1967, and was found to be physically acceptable. He was then ordered to report for induction on July 17, 1967. This order was cancelled, since his appeal had not yet been determined by the Appeals Board. On August 16, 1967, the Appeals Board classified him in Class 1-A by a vote of 5-0.

Petitioner and others had been engaged in organizing activities among the poor in Eastern Kentucky and in leading the opposition to strip mining that was taking place there. On August 11, 1967, petitioner and others were arrested in Pike County on a charge of "teaching sedition" and "advocating the overthrow of the government of Pike County." The arrest and threatened prosecution were found by a three-judge United States District Court to have been undertaken in part for the purpose of stopping organizing activities in Pike County. The Court also held that the statute in question, Kentucky Revised Statutes 432.040, was unconstitutional on its face, and enjoined any prosecution under it. *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D. Ky. 1967). On September 5, 1967, petitioner advised his local board that he was under

bail to the federal court in connection with the above case (the right of the defendants in that action to appeal did not expire until November 17, 1967) and under bail to the Pike Circuit Court on a charge of flourishing a deadly weapon (that charge was subsequently dismissed). On September 21, 1967, the board issued an order to report for induction, which was cancelled on October 12, 1967.

Following his arrest and the proceedings in federal and state courts, the petitioner's beliefs as to conscientious objection to participation in war came to maturity, and on October 17, 1967, he wrote a letter to the board stating that "after much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form." (Appendix E, p. 30a). He was then sent the Special Form for Conscientious Objectors (SSS Form 150), which he returned on October 26, 1967. He gave detailed answers to the questions on the form, stating among other things that he believed in a Supreme Being and that his religious training taught him that it was "against God's law to kill." He further stated that to be a member of the Armed Forces of any country would oblige him to kill or indirectly assist in killing. (Appendix E, p25a).Various letters supporting his claim were sent to the board, including a letter from a Catholic priest. (Appendix E, p. 35a).

At the time that he submitted the completed form, petitioner also requested in writing a personal appearance before the board. He was advised that although he was not entitled to an interview, the board would grant him a "courtesy interview." This interview took place on November 9, 1967, and lasted between ten and fifteen minutes. (Appendix G, p. 45a). The Chairman of the board stated that "at that time the Board came to the conclusion that there

was no merit to his contention that he was entitled to conscientious objector status." (Appendix F, p. 39a). An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened." (Appendix E, p. 20a). The board, however, did not take a vote at the meeting of November 9th. On November 12, 1967, petitioner wrote a letter to the board setting forth his views more fully. (Appendix E, p. 32a). It was this letter which, according to the Court of Appeals, "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." (Appendix A, p. 8a).

On January 11, 1968, the board formally considered petitioner's claim for classification, and by a vote of 4-0 took the following action as noted in the Classification Questionnaire: "All information in file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of 1A class." (Appendix E, p. 20a). On January 21 petitioner wrote to the board, appealing from the board's failure to reclassify him in Class 1-O, stating that he considered his case to have been reopened. The board wrote in reply two days later that it did not consider his case to have been reopened and that he had no right to appeal. On the same date he received an order to report for induction on February 23, 1968.

On February 8, 1968, appellant filed a civil action in the United States District Court for the Western District of Kentucky, seeking to enjoin his induction into the Armed Forces on the ground that the order to report for induction was void, as having been issued in violation of applicable Selective Service Regulations and in such circumstances as to be violative of due process of law. On February 16, 1968, the

Court dismissed his complaint and denied relief. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, together with a motion for an interlocutory injunction pending appeal. The latter motion was denied on February 22, 1968. On February 23, 1968, the petitioner refused to submit to induction into the Armed Forces. The appeal in the civil case was dismissed as moot by the Court of Appeals on May 2, 1968.

The petitioner was indicted by the grand jury on March 11, 1968. He was arraigned on March 18, 1968, at which time he pleaded not guilty and further moved that the indictment be dismissed on the ground, inter alia, that "The Order to Report for Induction, the refusal to obey which forms the basis of said indictment, is illegal, void and of no effect, because it was issued in violation of the applicable statutes and regulations, and further because it was issued in such circumstances so as to deprive the defendant of due process of law." It was stipulated by counsel for the petitioner and counsel for the government that the record of the proceedings in the petitioner's civil suit should form a part of the record in the criminal proceeding. Portions of the record in the civil suit are set forth as Appendix F, p. 39a. On March 22, 1968, the District Court entered an order overruling the petitioner's motion. The Court also stated that it had read the selective service file of the petitioner and the transcript of the hearing in the civil suit, as a result of which it concluded that there was a reasonable basis in fact for the classification of the petitioner and that the actions of the board were proper in all respects.

The case was tried before a jury on April 5, 1968. At the conclusion of the government's case counsel for the petitioner moved for a judgment of acquittal, which was overruled. Counsel for the petitioner then presented his case

and called as witnesses the four members of the petitioner's selective service local board. Portions of their testimony are set forth as Appendix G, p. 41a. Following their examination of said witnesses, counsel moved for a judgment of acquittal on the ground that the testimony of board members showed conclusively that the petitioner had been denied a full and fair hearing and that the demonstrated incompetence of the members of the board in passing on the petitioner's claim for classification as a conscientious objector constituted a denial of due process. This motion was overruled. At the conclusion of the petitioner's case, the motion was renewed together with a written motion for acquittal, filed by petitioner's counsel that day. All said motions were overruled. The jury returned a verdict of guilty, and sentence was imposed on April 8, 1968.

The petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I

In holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification nor did it reopen his classification in fact, United States Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decisions of other Courts of Appeal on the question of when a board abuses its discretion in refusing to reopen and when it has reopened in fact. Further, in conflict with the decisions of other Courts of Appeal on the same question, it applied the "basis in fact"

test applicable to the judicial review of a board's final determination to the review of the board's determination that a registrant failed to make out a prima facie case for reopening, and held that the board was entitled to engage in evaluative consideration of all the information in a registrant's file under the guise of determining whether the new information submitted by the registrant, if true, would entitle him to the claimed classification.

Throughout these proceedings the essential contention of the petitioner has been that in the circumstances of this case either the board was required to reopen his classification or that, in fact, the board did reopen his classification, but denied him the appeal to which he was entitled under 32 C.F.R. Section 1625.13. The Court of Appeals held that the board was not required to reopen his classification because, based upon its consideration of all the information in his file, it could conclude that he had not made out a prima facie case. What the board did, and what the Court of Appeals permitted it to do, was to engage in an *evaluative consideration* of the petitioner's claim, so that it denied the claim on the merits without giving the petitioner the administrative appeal to which he was entitled under Section 1625.13. The board took the position that the petitioner did not make out a prima facie case, but it reached that conclusion only by considering all the information in his file, and evaluating the information favorable to that claim against the information that, in its opinion, did not support it.

The decision of the Court of Appeals, if permitted to stand, completely obliterates any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial of the classification on the merits after a reopening under Section 1625.2. Moreover, the holding that the board

neither abused its discretion in refusing to reopen nor did it reopen in fact, is directly in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Freeman* 388 F. 2d 246 (7th Cir., 1967), and the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F. 2d 973 (9th Cir., 1967).

The answers contained in petitioner's SSS Form 150 clearly make out a prima facie case of opposition to war on the basis of religious training and belief. The form is set out in full, Appendix E, p. 20a. but the following excerpts should indicate that the test of prima facie sufficiency was satisfied. The petitioner stated that he believed in a Supreme Being and that:

> "My religious training taught me that it is against God's law to kill. To be a member of the armed forces of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men." (Appendix E, p. 25a).

> "As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO." (Appendix E, p. 28a).

The petitioner explained in detail his religious training and experience and stated that he was most influenced by Father Thomas Merton and by the teachings of Jesus Christ. (Appendix E, p. 28a). The board was also in receipt of a letter from a Catholic priest supporting the petitioner's petition and attesting to his sincerity. (Appendix E, p. 35a). The board accepted everything the petitioner said as true and

assumed that he was sincere in his beliefs (Appendix F, p. 39a; Appendix G, pp. 49a, 50a). Notwithstanding the board took the position that the petitioner "still did not make out a case for conscientious objection, and therefore, we saw no reason to reopen the case, because it wasn't there." (Appendix F, p. 39a).

In the view of the Court of Appeals the refusal of the board to reopen the classification in these circumstances did not constitute an abuse of discretion. This is in direct conflict with the holding of the Court of Appeals for the Seventh Circuit in *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967). In that case the defendant gave rather sketchy answers to the questions contained in SSS Form 150. However, he did state that he believed in a Supreme Being, that he was a member of the Islam religion, and that by reason of his religious beliefs he was opposed to participation in war in any form. There was nothing more, and according to Judge Koch, dissenting, "Most of this data comes from statements appearing in the printed form which were adopted by the defendant by check mark or signature." 388 F.2d at 250. The Court held that what he had stated was sufficient to make out a prima facie case for classification as a conscientious objector, "since he presented new information in his SSS Form 150 which, if true, entitled him to reclassification." The conviction, therefore, was reversed. If it was an abuse of discretion for the board to refuse to reopen in that case, it was clearly an abuse of discretion for the board to reopen in the case at bar in view of the information that the present petitioner furnished in response to the questions contained in SSS Form 150. The petitioner set forth new facts which, if true, entitled him to the claimed classification, and these new facts were accepted as true by the board. The decision of the Court of Appeals for the Seventh Circuit in

Freeman and the decision of the Court of Appeals for the Sixth Circuit in the case at bar set forth very different tests for determining when a registrant seeking classification as a conscientious objector has made out a prima facie case for reopening. This Court should grant certiorari to resolve the conflict.

In refusing to reopen the petitioner's classification, the board took the position that the petitioner was seeking an occupational deferment rather than classification as a conscientious objector. (Appendix F, p. 39a). The Court of Appeals noted this fact and further observed that the petitioner's objection to serving in the Armed Forces was "based on essentially political, sociological views and his conscience rather than on religious training and belief." This was said to have been "rather clearly indicated" from the letter of November 12, 1967, which he sent to the board. (Appendix E, p. 32a). The Court of Appeals also stated that there was evidence in the file from which the board could have concluded that the petitioner was not sincere in his beliefs, particularly since he had made "inconsistent statements" and there were facts which "cast doubt upon his veracity." This completely ignores the fact that his board assumed that everything the petitioner said was true and that he was sincere in his beliefs. (Appendix F, p. 39a; Appendix G, pp. 49a, 50a).

It was never denied by the Court of Appeals that the petitioner presented at least some facts - at a minimum his answers to the SSS Form 150 and the supporting letters - which, if true, would have entitled him to be classified as a conscientious objector. The conclusion that the petitioner really wanted an occupational deferment - the board's position - or that his opposition to war was not based on religious training and belief - the Court's position - could be

reached only by the evaluation of all other information in his file. Such an evaluation constitutes a determination of the claim on the merits, a weighing of seemingly contradictory information .and the drawing of inferences from such information. When a board has engaged in this kind of determination, it cannot be heard to say that "the new facts, if true, would not justify a change in the registrant's classification" within the meaning of 32 C.F.R. Section 1625.4. What the board has done is to conclude that the new facts, when considered in light of other facts and evaluated against those facts, would not justify a change in the registrant's classification. By so doing, it has reopened the classification, and the registrant is entitled to an administrative appeal, as provided in 32 C.F.R. Section 1625.13.

In the case at bar, however, the Court of Appeals, held that the board could engage in such evaluative consideration, based upon all the information in the petitioner's file (as opposed to the new information submitted by the petitioner in support of his claim for reclassification), without thereby reopening the classification so as to entitle the registrant to an administrative appeal. That holding is directly in conflict with the holding of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). In that case the appellant had been classified I-A and had passed his pre-induction physical. Less than a month later he wrote a letter to the board claiming to have become a conscientious objector. He completed the SSS Form 150, and after an improper order to report for induction had been cancelled, the board proceeded to consider his request for a reopening of his classifica on. The board refused to reopen on the ground that "the information submitted did not warrant reopening of the classification." It noted that he had previously applied for enlistment in a reserve program, for

which he had not been accepted, and as a result it was "the opinion of the board that the registrant was seeking to avoid induction." In reversing the conviction for refusal to submit to induction, the Court stated:

> "It cannot be held that the statements and information in appellant's letter and executed form No. 150, if true, would not be able to provide basis for a conscientious objector classification and so could not justify a consideration of the question of change in his classification. . . . what the board actually did, as the implications of its minutes reflect, was to engage in evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation, entitled to credence in fact. . . .
>
> [T]he local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made, so as to entitle consideration and evaluation to be engaged in thereafter under the general classification procedure of the regulations. It shortcut the consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file. It weighed the information contained in the appellant's form against other probative factors (such as his attempted reserve enlistment during the month preceding) and arrived at the judgment that he was not in truth a conscientious objector but was merely seeking to avoid induction." 388 F.2d at 973, 976.

In the case at bar the board weighed the information contained in petitioner's SSS Form 150 and in the supporting

letters he submitted against other probative factors based on the information contained in his entire file, principally his previous claim for an occupational deferment, and concluded that he was not "in truth a conscientious objector but an anti-poverty worker seeking to avoid induction under the guise of being a conscientious objector." The Court of Appeals sanctioned such evaluative consideration and engaged in it on its own by weighing the information contained in the SSS Form 150 and supporting letters against other information, concluding that the petitioner's opposition to war was not based on religious training and belief, as he contended, but upon "essentially political, sociological or philosophical views and his conscience." And it did so despite the fact that the action of the board must be supported on the grounds which the board gave for such action. *Gatchell v. United States* 378 F.2d 287 (9th Cir., 1967).

Its decision is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States, supra.* It is likewise in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Robertson v. United States,* 404 F.2d 1141 (5th Cir., 1968). There the registrant, who had previously been denied a ministerial exemption, presented evidence that he was working 100 hours per month as a "Vacation Pioneer" and that his sect considered some Vacation Pioneers to be regular ministers. The Court held that the evidence presented was sufficient to make out a prima facie case, and that "the regulations do not permit the board to evaluate a request for classification on its merits until it first determines whether the information submitted by the registrant requires reopening." The action of the board in that case was improper, because "it considered whether or not he should be reclassified, and having decided that he should not be, refused to reopen his classification."

In the case at bar the Court of Appeals did not review the information supplied by the petitioner, which the board accepted as true, and determine whether that information required a reopening. Instead it allowed the board to evaluate the petitioner's request on the merits and then to refuse to reopen the classification, thereby depriving him of his right to appeal.

The approach of the Court of Appeals for the Sixth Circuit to judicial review of a board's refusal to reopen a classification differs from the approach taken by other Courts of Appeal in two very important respects, and this difference, it is submitted, results in the Court's (1) holding that the board has not abused its discretion in refusing to reopen in circumstances in which other Courts of Appeal find an abuse of discretion, and (2) allowing the board to engage in evaluative consideration on the merits under the guise of finding that the registrant did not make out a prima facie case for reopening. The Court of Appeals for the Sixth Circuit appears to be applying the same "basis in fact" test applicable to to judicial review of a board's final determination to the review of a board's determination that a registrant failed to make out a prima facie case. It was of the opinion that "there was a rational basis for the board's determination that Mulloy had not established a case of conscientious objection." In arriving at that conclusion it looked to all the information contained in the petitioner's file and singled out certain information that in its opinion showed that his beliefs were "political, sociological and philosophical rather than religious" and certain information showing that the board could find he was not "sincere" (ignoring the fact that the board assumed he *was* sincere in his beliefs). This is the approach that may properly be taken to judicial review of a merits determination under the "basis in fact test," *Witmer v.*

United States, 348 U.S. 375 (1955), but it is totally inappropriate to judicial review of a board's refusal to reopen.

The distinction between the scope of review of a board's final determination and review of a board's refusal to reopen was discussed at length by the Court of Appeals for the Ninth Circuit in *Petrie v. United States*, 407 F.2d 267, 274-5 (9th Cir., 1969), where the Court observed:

> "As applied to an action of the local board in refusing to reopen a classification pursuant to a registrant's request, the basis in fact test is substantially different in degree from that applied to the board's final classification decision. As to the latter action, basis in fact consists of 'some proof' - something which may be less than substantial evidence - to support the *evaluative classification decision*...In comparison, the Regulations governing reopening...have been construed to require only that the registrant present to his local board a 'prima facie case' supporting his request for placement in another classification...Thus, 'refusal to reopen has no basis in fact if the written request to reopen sets forth a prima facie case for reclassification and if it contains some allegations of fact in addition to those considered when the registrant was originally classified..."

The Court also approved the explanation of the prima facie case test set forth in *United States v. Longworth*, 269 F.Supp. 971, 974 (S.D. Ohio 1967), to the effect that, "the board is mandated into at least looking at the facts as stated, considering whether it has previously known those facts when its prior classification was made and considering whether the facts stated, if true would to *any* reasonable mind, justify a reclassification." And in *Howze v. United States*, 409 F.2d 27, (9th Cir., 1969), the Court posed the

test in terms of whether the board *would have* a basis in fact to grant the requested classification on the basis of the information that the registrant submitted.

It is clear that the Court of Appeals for the Sixth Circuit is applying a very different standard for judicial review of a board's refusal to reopen from that being applied by the Ninth Circuit. Since the Sixth Circuit's standard is the same one that it applies to review of a final determination, it is very likely, as in the case at bar, to uphold a refusal to reopen in circumstances where the Ninth Circuit would find that the refusal to reopen would constitute an abuse of discretion. The decisions of the Ninth Circuit in *Petrie v. United States, supra,* and *Howze v. United States, supra,* as contrasted with the decision of the Sixth Circuit in the case at bar, demonstrate this difference, as does the decision of the Seventh Circuit in *United States v. Freeman, supra.*

The Court of Appeals for the Sixth Circuit also stands alone in its holding that in determining whether the registrant has made out a prima facie case for reopening the board can consider and evaluate all the information in the registrant's file against the new evidence which he has submitted in support of his claim. This is contrary to the express language of Section 1625.4, which says that the board shall not reopen if it is of the opinion that the *new facts,* even if true, would not justify a change in the registrant's classification. If the board is to consider all the information in the registrant's file, including that previously considered with respect to a claim for another classification, it is necessarily determining the claim on the merits rather than determining whether the registrant made out a prima facie case. All other courts passing on the question have looked only to the evidence submitted by the registrant in support of his claim in order to determine whether he has made out a prima facie case for

reopening. If that evidence is sufficient to make out a prima facie case, the board is required to reopen, *and at that time it evaluates the information submitted against other information in the file*. If it denies the claimed classification on the merits, the registrant is entitled to an administrative appeal, which is denied to him if the board refuses to reopen. See *Robertson v. United States*, 404 F. 2d 1141-7 (5th Cir., 1968); *Davis v. United States*, 410 F. 2d 89, 93-95 (8th Cir., 1967); *United States v. Freeman*, 388 F. 2d 246, 249 (7th Cir., 1967); *Howze v. United States*, 409 F. 2d 27, 28 (9th Cir., 1969). The facts in *Davis v. United States, supra*, were very similar to the facts in the case at bar, and there the Court observed:

> "Davis' statements, taken from his Selective Service Form 150..., if taken as true, demonstrate that he is conscientiously opposed to participation in war in any form and that his objection is based on religious training and belief. Accompanying his conscientious objector Form 150 was a letter from his pastor...
>
> These statements, if accepted at face value, constitute a prima facie case for the conscientious objector classification as specified in 50 U.S.C. App. Section 456 (j). The local board was therefore required to reopen his classification. 32 C.F.R. Section 1625.2. . . ." 410 F. 2d at 94-5.

And, as observed in *United States v. Freeman, supra*, "In our opinion the Local Board was compelled to reopen Freeman's classification in 1962 and extend to him all the rights provided in the regulations since he presented new information in his 1962 SSS Form 150 which, if true, entitled him to reclassification." 388 F. 2d at 249.

In the case at bar the Court stated that the board had the power to investigate and determine whether the facts stated in support of the application for reclassification were true and that this justified a consideration of all the information in the file. *But the board accepted as true everything that the petitioner stated.* (Appendix G, p. 50a). This being so, consideration of all the information in the file could not even be justified on this ground.

This Court should grant certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar and the decisions of other Courts of Appeal on the question of when a board abuses its discretion by refusing to reopen a classification on the ground that the registrant has not made out a prima facie case and when a board has, in fact, reopened by engaging in evaluative consideration. So too, it should grant certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar and the decisions of other Courts of Appeal with respect to the test proper for judicial review of a board's determination that a registrant has not made out a prima facie case for reopening and with respect to whether in passing upon such a request, the board is limited to a consideration of the new information furnished by the registrant, which it accepts as true, or whether it may engage in evaluative consideration of all the evidence in his file.

II

Certiorari should be granted to review the holding of the Court below to the effect that the petitioner failed to make out a prima facie case for classification as a conscientious objector because his opposition to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than religious training and belief," since in so holding, the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious belief.

In *Sicurella v. United States*, 348 U.S. 385, 391 (1955), this Court observed:

> "The Court of Appeals also rested its decision on the conclusion that petitioner's objection to participation in war was only a facet of his real objection to all governmental authority. We believe, however, that if the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act. *Once he comes within Section 6 (j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.*" (emphasis added)

Granted that Congress has not chosen to exempt those whose opposition to war is based upon "political, sociological or philosophical views or a merely personal moral code," if one's opposition to war is based in part on religious training and belief, he is entitled to classification as a conscientious

objector, although his opposition may be based on other kinds of beliefs, *i.e.*, political, sociological and philosophical, as well.

The present petitioner stated in the answers to SSS Form 150 that his opposition to war was based on religious training and belief and explained how he arrived at that position. (Appendix E, pp. 25a-28a). A letter from a Catholic priest explained how opposition to participation in war was consistent with the teachings of the Catholic Church. (Appendix E, p. 35a). However, the petitioner is not a quiet pacifist. To him his religious beliefs meant becoming involved in political action, particularly working among the poor in the mountains of Eastern Kentucky. They meant working against the coal operators and strip-miners and organizing the poor for political power. To the petitioner this was directly related to his religious beliefs. As he stated in his answers to the SSS Form 150:

> "As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church attendance. And I place Thou Shalt Not Kill above An Eye for an Eye. I learned rapidly in my work in the southern Highlands the significance of life and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way. Violence only breeds violence." (Appendix E, pp. 27a-28a).

As a result of his activities in Eastern Kentucky, the petitioner and others were arrested and indicted on a charge of "teaching sedition" and "advocating the overthrow of the

government of Pike County." A three-judge United States District Court found that the prosecution was undertaken at least in part for the purpose of stopping organizing activities in Pike County and enjoined the prosecution under a statute which it found to be unconstitutional on its face. *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D.Ky. 1967).

The petitioner's beliefs also caused him to work against the war. As he stated in his SSS Form 150 in response to the question, "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions:"

> "I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam." (Appendix E, p. 28a).

Following his "courtesy interview" with the board, he wrote a letter saying that he expected that the board would draft him "regardless of my feelings." At that time he stated that he had not made up his mind what course he would follow. He then stated:

> "If I decided to go into the Army I will, of course, do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think..." (Appendix E, p. 33a).

According to the Court below, this letter "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." (Appendix A, p. 8a).

By so holding the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious training and belief. The Court focused on the petitioner's political activity and ignored his statements of religious belief and the letters submitted in support of its claim. In so doing, it disregarded the test set forth by this Court in *Sicurella v. United States, supra.*

There is the real danger that the Court below may appear to be saying something else, namely that once a registrant engages in "political activity," particularly opposition to the war and the draft, he forfeits the claim that his beliefs are "religious." The "religious conscientious objector" then is defined as a person who does not "resist the system," but "quietly holds to his views." But the person whose religious beliefs cause him to actively resist war and conscription will be found to be a "political" rather than a "religious" conscientious objector.

The decision of the Court below with respect to the "essentially political, sociological or philosophical" opposition to war on the part of the present petitioner is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Fleming v. United States,* 344 F.2d 912 (10th Cir., 1965). There the Court held that although the registrant might have been influenced more by sociological and philosophical views rather than by religious beliefs, since he had been influenced in part by religious training and belief, he was entitled to classification as a conscientious objector. The Court stated:

> "As we read the Seeger case, it clearly lays down the rule that before a conscientious objector classification

> may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code,' those factors must be the *sole* basis of his claim for the classification...
>
> The entire record clearly shows that his beliefs are, in part at least, based upon religious convictions. It may be true that appellant has been influenced, in the words of the hearing examiner "*** more by sociological and philosophical views than by religious beliefs or the dictates of a deity.' But it is also clear that he has been influenced by religious training and belief. Therefore, Fleming comes clearly within the definition of a "conscientious objector..." 344 F.2d at 916.

The record in the case at bar also clearly shows that the present petitioner has been influenced, at least in part, by his religious training and belief. He so stated in his answers to the SSS Form 150, and the board accepted everything he said as true and found that he was sincere in his beliefs.

Certiorari should be granted because the decision of the Court of Appeals for the Sixth Circuit on the question of "religious" versus "political, sociological or philosophical" belief is in conflict with applicable decisions of this Court and in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Fleming v. United States, supra.*

III

The holding of the Court below that the petitioner could be denied classification as a conscientious objector because his opposition to war was not based upon religious training

and belief assumes that Congress may, consistent with the First Amendment,' limit the conscientious objector exemption to those whose opposition to war is based upon religious training and belief. Certiorari should be granted, because this raises the same question as is raised in United States v. Sisson, which is currently before this Court.

Petitioner has maintained throughout these proceedings that his opposition to war was based upon conventional religious training and belief, namely the teachings of the Catholic Church and Jesus Christ. The Court below, quoting from petitioner's letter to his board of November 12, has taken the position that his objection to serving in the Armed Forces was based upon "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." (Appendix A, p. 8a). It was never suggested by the board, the government or the Court that the petitioner was not opposed, politically, philosophically, as a matter of conscience or otherwise, to participation in war. Therefore, if it is concluded that the petitioner did not make out a prima facie case of conscientious objection on the basis of religious training and belief, it cannot be denied, particularly in view of the great weight that the Court attached to his letter of November 12, that he *did* make out a prima facie case of conscientious objection on the basis of "political, sociological or philosophical views and his conscience."

In *United States v. Sisson*, 297 F.Supp. 902 (D.Mass. 1969), it was held that 50 U.S.C. App. Section 456 (j) was unconstitutional on the ground, *inter alia*, that it limited the conscientious objector exemption to those who were opposed to participation in war by virtue of religious training and belief, in violation of the provision of the First Amendment that "Congress shall make no law respecting the

establishment of religion or prohibiting the free exercise thereof." A direct appeal was taken to this Court pursuant to the provisions of 18 U.S.C. Section 3731. If it is unconstitutional to limit the exemption to those whose opposition is based upon religious training and belief, the constitutional rights of the present petitioner have likewise been abridged, since it is not disputed that he was conscientiously opposed to participation in war, although the Court found that this objection was not based upon religious training and belief.

In view of the Court's holding as to the nature of the petitioner's beliefs, this argument was expressly presented in the petition for rehearing, which was rejected. This Court should grant certiorari, because the case at bar raises the same issue as is raised in *United States v. Sisson.*

IV

This Court should grant certiorari to settle the question of whether the denial of the opportunity for full review of a claim for classification as a conscientious objector, including review by an appeals board, when such claim has been presented for the first time, constitutes a violation of due process of law, as guaranteed by the Fifth Amendment.

Whenever a board summarily dismisses under 32 C.F.R. Section 1625.4 a claim that has been made for the first time, the registrant will never have had his claim reviewed by an appeals board. At the same time registrants whose claim was made at the time of the original classification or whose classification was reopened and their claim denied on the merits do have the right of appeal. However, all three

registrants have presented their claims for the new classification, here conscientious objector status, for the first time after the facts entitling them to such status have matured. To allow two of them to appeal while denying the right of appeal to the third, it is submitted, constitutes impermissible discrimination, "so unjustifiable as to be a denial of due process." *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk*, 377 U.S. 163 (1964).

It is not contended that due process requires that there be an appeal from the board's refusal to reopen the classification in all cases. *United States v. Beaver*, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963); *Klubnikian v. United States*, 227 F.2d 87 (9th Cir., 1955), *cert. denied*, 350 U.S. 975 (1956). What is contended is that where a claim for a particular status has been made for the first time, and that claim is not on its face "clearly frivolous," the registrant must be permitted to appeal from the board's refusal to recognize that claim. The right to appeal cannot be the subject of invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). This should be equally true of administrative appeals. Since registrants whose claim was made at the time of their original classification have the right to appeal, as do registrants whose classification was reopened and the claim denied on the merits, the right to appeal cannot be denied to a registrant who has likewise presented a claim for the first time. This is what occurs where the board refuses to reopen on the ground that the registrant has not made out a prima facie case - particularly, where as here, the board is permitted to engage in evaluative consideration of the registrant's entire file in order to determine whether he has made out a prima facie case.

Directly in conflict with the decision of the Court below

on this issue (the Court below disposed of the issue by saying that "other claims of error are insufficient to warrant reversal") is the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). In holding that a local board could not cut off a registrant's appeal rights by refusing to reopen under Section 1625.4 when it had, in fact, "engaged in a general consideration and evaluation of the claim," the Court first observed that such action "could not be harmonized with the provisions and purposes of Sections 1625.2 and 1625.11." It went on to hold that if such power existed, the action of the board would be discriminatory and violative of due process. The Court stated:

> "But if such an implied power can be regarded as being intended to exist under the regulations, then it must be held, we think, that the discrimination which the board effects against a conscientious objector claimant by dealing with his situation on this basis, as opposed to another such claimant of similar prima facie situation to whom it accords a reopening, would be a violation of the due process clause of the Fifth Amendment.
>
> In the latter situation, a conscientious objector claimant would be left with the procedural rights to appear, be heard, and take an appeal, while in the first situation there would be a foreclosure of these substantial incidents to a similar claimant. For a local board to be able to effect a discrimination of such substance between prima facie situations of legal equality would seem to us to constitute a matter of basic unfairness and hence to be, in the language of *Bolling v. Sharpe* and *Schneider v. Rusk*, 'so unjustifiable as to be violative of due process'."

(citations omitted) 388 F.2d at 976-977.

This Court should grant certiorari to resolve this important question of procedural due process and to resolve the conflict between the decision of the Ninth Circuit in *Miller* and the decision of the Sixth Circuit in the case at bar.

V

This Court should grant certiorari to consider whether the due process requirement of a full and fair hearing necessitates that a selective service local board in passing on a claim for classification as a conscientious objector read the registrant's file with some degree of care, particularly his SSS Form 150, and further that it possess a minimum understanding of the applicable statute and regulations in order to pass intelligently on said claim.

Administrative due process includes the right to a full and fair hearing. *Morgan v. United States*, 289 U.S. 468 (1936). This applies with equal force to a hearing by a selective service local board. *Bejelis v. United States*, 206 F.2d 354 (6th Cir., 1953). It is the contention of the petitioner that he was denied a full and fair hearing by his local board in that (1) it did not give proper consideration to his claim by reading his file with some degree of care, at least his SSS Form 150, and (2) the members of the board lacked the competency and understanding of the applicable statute and regulations to pass intelligently on his claim.

It seems agreed that the petitioner's "courtesy interview" with his local board on November 9, 1967, lasted about ten or fifteen minutes. (Appendix G, p. 45a). What stands out from the record is that petitioner's file, particularly his SSS

Form 150, was not carefully examined by any member prior to the meeting. In answer to the question, "Prior to the meeting did you read his Selective Service file," board member Downes stated: "I scanned it because I am the newest member on this particular board and I was not familiar with what was in his file at all." (Appendix G, p. 43a). He also did not remember whether he had looked at the petitioner's SSS Form 150. (Appendix G, p. 43a). Board member Downes also testified that "the only time that I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started." (Appendix G, p. 47a). Board member Wolking testified that he read the file, but that he did not specifically recall having gone through it nor did he recall how much time he spent on it. (Appendix G, p. 46a, 47a). Board member Rickert, who was not present at the November 9th meeting, but who did vote at the January 11th one, at first testified that he had not read the petitioner's responses to SSS Form 150. (Appendix G, p. 51a). He then said that he looked at the file before the meeting of January 11th. (Appendix G, p. 52a). Board chairman Sherman testified that "the board members looked over his file before he came in as we do anybody else." (Appendix G, p. 54a).

It is clear that no board member went through the petitioner's file thoroughly, reading and analyzing the detailed answers he gave to the questions contained in SSS Form 150. The file was "scanned" prior to the time he came in. The interview lasted about ten or fifteen minutes. No questions were directed to the contents of SSS Form 150; in fact, board members did not recall asking any questions at all. (Appendix G, p. 48a). It is submitted that the above clearly demonstrates that the board did not give full and fair consideration to the petitioner's claim. In *Zenith*

International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir., 1961), the Court held that the owner of a film declared to be obscene had been deprived of a full and fair hearing because administrative officials had failed to view a film in its entirety before declaring it to be obscene. So too, a local board should be required to carefully read a registrant's selective service file, or at least his detailed answers to SSS Form 150, before concluding that "the new facts even if true, did not make out a prima facie case for entitlement to classification as a conscientious objector." Perhaps the board was "too busy" to consider his file carefully, but matters of due process cannot be compromised "on the footing of convenience or expediency." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 305 (1937).

It has been observed that in regard to the draft law, "probably no provisions have been examined more closely than those relating to the deferment of conscientious objectors." *United States v. Gearey*, 368 F.2d 145, 146 (2nd Cir., 1966). And yet it is doubtful whether the members of the petitioner's board had any more than the vaguest understanding of the applicable statute and regulations in regard to that classification. This is not surprising, since the clerk of the board testified that in her seventeen years with the Board *no registrant had ever been assigned to civilian work as a conscientious objector.* (Appendix G, p. 42a). The testimony of the board members concerning their understanding of the applicable statute and regulations is most revealing. In response to the question of whether he was "thoroughly familiar with the regulations governing classification of conscientious objectors," board member Downes testified:

> "I can't say that I'm thoroughly familiar. As I indicated to you before, I am perhaps the youngest

person on the particular board, (Appendix G, p. 43a). He then stated that he had an understanding of "what a conscientious objector is" in a general sense. This was:

> "Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity."

If a registrant could obtain conscientious objector status simply by "saying" that he is one, the present petitioner would not now be under a sentence of five years' imprisonment. The dialogue continued:

> Q: Well, the draft Board has to make that decision, doesn't it? He can't just do it on his own.
>
> A: The draft Board, I thought now, was involved primarily with determining the availability of people." (Appendix G, p. 45a).

Board member Wolking did not know what classification was to be given to conscientious objectors. He also seemed to think that by signing SSS Form 150 the petitioner stated that he would *not* perform civilian service in the national interest. (Appendix G, p. 49a). Board Chairman Sherman, an attorney, was completely confused regarding the distinction between classification in Class 1-O and classification in Class 1-A-O. He did not know if the board could classify a person as qualified for noncombatant service only, and thought that if the board found that the petitioner was a conscientious objector, he would be classified in Class 1-A-O. (Appendix G, p. 54a. His understanding of a conscientious objector was "one who has conscientious scruples against taking another person's life even under any circumstances." (Appendix G, p. 53a). This, of course, is not the definition given in the statute, which is based upon opposition to participation in *war* in any form, and one who would take human life in

self defense may still be classified as a conscientious objector. *Taffs v. United States*, 208 F. 2d 329 (8th Cir., 1953), *cert. denied*, 347 U.S. 928 (1954).

The foregoing makes it abundantly clear that the board members had little or no understanding of the law governing the petitioner's claim for conscientious objector status. Administrative agencies, including selective service local boards, are deemed to have "expertise" in the law they are administering. The petitioner's local board not only lacked such "expertise" when it came to determining a question of conscientious objection, but clearly demonstrated administrative incompetence.

The question of whether due process is denied when a local board, lacking basic competency and understanding of the applicable statute and regulations, passes on a claim for classification as a conscientious objector has not been decided by this Court. Nor has it been definitely established by decisions of this Court that the members of a local board are required to read and analyze a registrant's file, particularly his SSS Form 150, with some degree of thoroughness before holding that he did not make out a prima facie case for reopening. Both questions are presented in the case at bar, and this Court should grant certiorari to resolve them.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A
Opinion of the United States Court of Appeals for the Sixth District

FILED
JUN 10 1969
CARL W. REUSS, Clerk

No. 18709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH THOMAS MULLOY,
Defendant-Appellant.

APPEAL from United State District Court for the Western District of Kentucky.

Decided June 10, 1969.

Before: WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

WEICK, Chief Judge. Appellant Mulloy was convicted in the United States District Court of wilfully refusing to submit to induction into the Armed Forces, in violation of Military Selective Service Act of 1967. 50 U.S.C. App. § 462(a). A sentence of five years' imprisonment and a fine of $10,000 were imposed.

Appellant contends that the grand jury and the petit jury were improperly constituted; that the Universal Training Service Act as amended in 1967 is unconstitutional; and that the Vietnam war is illegal. These same contentions were made in *United States* v. *Pratt*, — F.2d — (No. 18,710, 6th Cir. 1969), which case was consolidated for argument with this one. For the reasons and upon the authority relied upon in *Pratt*, we reject these contentions.

Appellant further contends that his procedural rights were violated by the refusal of his Local Board to reopen his classification of 1-A (available for military service) which

was granted to him by the Appeal Board. He asserts that this was arbitrary and unreasonable and constituted an abuse of discretion; and that it deprived him of a second administrative appeal and violated his constitutional rights.

Mulloy registered for the draft on June 13, 1962. He filed his Classification Questionnaire (SSS Form 100) on June 17, 1963. He did not at that time request an exemption as a conscientious objector. On November 22, 1963 his Local Board classified him 2-S (college student), which classification remained for four years. After leaving college he was employed by the Appalachian Volunteers, operated by the Office of Economic Opportunity, and was granted a one-year occupational deferment by the Board. Upon expiration of this deferment, he requested another occupational deferment so that he could continue his work with the Volunteers, but the Board on May 17, 1967, in accordance with its policy in such cases to limit deferment to one year, denied his request and classified him 1-A.

On May 17, 1967 Mulloy was ordered to report for a physical examination. On May 19th he wrote a letter appealing to the Board to review and reconsider his request for an occupational deferment. On June 26th he was found qualified at the Armed Forces Examining Station and was notified of his acceptability by Statement of Acceptability (DD Form 62). The Board wrote Mulloy on July 3, 1967, asking whether he wanted it —"

> ". . . . to first review your file and then forward it to the Appeal Board or simply forward to the Appeal Board only . . . ."

He replied that he —

> ". . . appealed the classification on the grounds of occupation and asked for a renewal of my 2-A deferment. . . . Please do what is necessary to reconsider my classification."

On July 17, 1967 the Board issued an order to Mulloy to report for induction. He then requested that his appeal be forwarded to the Board of Appeal and also asked for a personal appearance. The Board denied his request for personal appearance because the request had not been made within thirty days after classification, as required by the regulation (32 C.F.R. § 1624.1(a)). Although his right to appeal had expired, and because of an apparent misunderstanding, the Board forwarded his file to the Appeal Board and cancelled the order to report for induction. On August 16, 1967 the Appeal Board classified him in 1-A by a 5-0 vote.

On September 5, 1967, the Board received a letter from Mulloy advising that he was under arrest and out on bail, charged with sedition for teaching and advocating the violent and forceful overthrow of the United States Government and the State of Kentucky. On September 21, 1967 the Board issued an order to report for induction on October 16, 1967. This was the second induction order. On October 9th the Board received another letter from him advising that he was still under a $5,000-bond in the U.S. 6th District Court and also under a $500-bond to the Pike County Court "on the charge of flourishing a deadly weapon. I request that you cancel that induction order . . . ."

On October 12, 1967 the Board cancelled the second order to report for induction and advised Mulloy by letter of its action. On the day after he was scheduled to report for induction under the cancelled order, he wrote to the Board asking for "A Conscientious Objector Application Form", which was supplied to him. He returned it to the Board with attachment thereto on October 30, 1967. In his letter enclosing the form he stated that his lawyer advised that he was still under bond to the Federal Court in Lexington and "I request a personal interview with my Board to discuss my appalachian."

The Board replied by letter advising him that his appeal rights and personal appearance time had both expired but that

it was granting him a personal appearance through courtesy. 32 C.F.R. § 1625.1(c).

Mulloy appeared at the meeting. The Board received and placed in his file a number of letters in support of his request. The Clerk of the Board prepared a resume of his appearance and placed it in his file. The resume indicates that the Clerk was instructed to write to the Federal Court in Lexington to inquire concerning his appeal and bond. The resume further stated:

> "Until such time as a reply is received, the members would not consider him a C.O."

An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened."

On November 17, 1967, the Board received a letter from Mulloy in which, among other things, he stated:

> "This brings us to the war in Vietnam and my draft situation. I do not question individual integrety [sic] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience
>
> . . . .
>
> "Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interests, now and in the future generations, to follow my conscience.
>
> "I feel that you are going to try to draft me anyway, regardless of my feelings. *I have not made up my mind as yet.* If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. *If I choose not to go into the Army I will resist induction and make the biggest stink about it possible.* I must do this to bear witness to my beliefs and to cause my fellow citizens to think. . . ." [Italics ours]

By letter dated December 2, 1967, Mulloy advised the Board that he had been "fired" by the Appalachian Volunteers "for stating that I am a C.O. and would refuse induction if ordered"; and that as far as he knew he was still under bond to the Federal Court.

On December 6, a letter from the Clerk of the District Court at Lexington was placed in his file which stated that Mulloy was recently a plaintiff in a civil action filed on the Pikeville Docket, but that the Clerk had "no information of his ever being a defendant in a matter in this court either civil or criminal."

On January 3, 1968, Mulloy wrote to the Board stating that he was now employed by the Southern Conference Educational Fund in Louisville and was working on a book "about my experience with the Poverty War in Appalachia"; and that the sedition charges had been dropped and the bond released. He was not sure about the Pike County peace bond.

On January 19, 1968, he was advised by letter from the Board that his file had been reviewed at its meeting held on January 11th, and that the members felt that the information in his file did not warrant a reopening of his classification. On January 21, Mulloy wrote to the Board appealing from the Board's failure to reclassify him 1-O. He stated that he considered the November interview a reopening of his case. The Board wrote in reply two days later that it did not consider the courtesy appearance as a reopening of his case since his time for appeal and personal appearance had expired. He was ordered to report for induction on February 23, 1968, but refused to submit.

Selective Service Regulation 32 C.F.R. § 1625.2, entitled "When Registrant's Classification May Be Reopened And Considered Anew," provides in part that the Local Board may reopen and consider anew the registrant's classification upon written request of the registrant —

> ". . . if such request is accompanied by written information presenting facts not considered when the registrant

was classified, which, if true, would justify a change in the registrant's classification."

Selective Service Regulation 32 C.F.R. § 1625.4, entitled "Refusal to Reopen And Consider Anew Registrant's Classification," provides in part:

". . . [E]ven if new facts are presented, [when] the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification."

Under Regulation 1625.2 the Board has discretion to determine whether or not it will reopen a classification, but Regulation 1625.4 appears to be mandatory in that the Board *shall not* reopen the classification when it is of the opinion that the facts, if true, do not justify a change in the classification.

In *Smith* v. *United States*, 157 F.2d 176 (4th Cir. 1946) Judge Soper, who wrote the opinion for the Court, said:

"Whether or not the additional evidence was of sufficient weight to require a reopening of the case lay within the discretion of the board and it cannot be said under the circumstances that the discretion was arbitrarily exercised." *Id.* at 181.

Smith was followed by the Seventh Circuit in *United States* v. *Bartelt*, 200 F.2d 385, 389 (7th Cir. 1952).

Mulloy contends that in determining whether to reopen the classification the Board was limited to consideration of only the Special Form For Conscientious Objector (SSS Form 150). In our judgment, the Board had not only the right but also the duty to consider not only the form but also the attachment thereto, the letters received in connection therewith and the entire file. This is implicit in the holdings of the Second Circuit in the two *Gearey* cases. *United States* v. *Gearey*, 368 F.2d 144 (2nd Cir. 1966); *United States* v. *Gearey*, 379 F.2d 915 (2d Cir. 1967).

In *Gearey*, the Board considered on the merits the request to reopen a classification after an order to report for induction, and the Court held that there was a rational basis for the Board's determination that the registrant was not a genuine conscientious objector and the Board therefore was not required to reopen his classification.

Appellant's contention, if upheld, would result in interminable delays in proceedings before Local Boards and indeed might frustrate the operation of the Selective Service System.

> "As the Tenth Circuit has pointed out, religious 'conversions' of convenience might well upset the orderly administration of the selective service system." *United States* v. *Taylor*, 351 F.2d 228, 230 (6th Cir. 1965).

Under Mulloy's contention, all a registrant needs to do is to state facts in support of his application and the Board is limited to his statement. In our judgment, the facts stated must be true and the Board has the power to investigate and determine the truth. Suppose a registrant who is classified 1-A requests the Board to reopen his classification and place him in 3-A, alleging that he is living with and supporting his wife and family. If appellant's allegations were true, the Board would be obligated to reopen his classification and reclassify him. *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956). However, the Board, under the investigative powers granted to it in 32 C.F.R. § 1625.1(c), may learn that the allegation was false. Is the Board nevertheless required to reopen his classification and reclassify him? We say, "No."

The Military Selective Service Act of 1967 omitted the provision contained in the 1940 Act for referral to the Department of Justice of conscientious objectors' claims, including the provision for appeal to the Appeal Board of Local Board action denying conscientious objector classification.

The legislative history of the statute indicates Congressional concern for "unusually long and unnecessary delay in processing

cases in the Department of Justice." H.R. No. 267, 90th Cong., 1st Sess. 1308, 1333-34 (1967). Congress was also of the belief that the decision of the Supreme Court in *United States* v. *Seeger*, 380 U.S. 163 (1965), had broadened the basis on which conscientious objection could be made, and resulted in an increase of administrative appeals and delays. The definition was changed so that conscientious objection must be based solely on religious training and belief, not including "essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C.App. § 456(j).

Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief. He even indicated at that late date that he had not made up his mind as to whether he would go into the army. The letters which he wrote to the Board revealed that he was principally interested in an occupational deferment.

Furthermore, the Board had the right to consider inconsistent statements made by the registrant as well as any fact which cast doubt on his veracity. *Witmer* v. *United States*, 348 U.S. 375 (1955).

The Chairman of the Local Board testified in Court that the Board's decision was based on all information available, including the file and what he said. He further testified that Mulloy's claim for deferment was based principally upon his job. He testified:

> "His claim, taking everything, assuming everything he said down there at that time to be so, he still did not make out a case for conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there."

The Act provides that classification orders of the Board shall be final. 50 U.S.C.App. § 460(b)(3). The Courts have

limited the scope of judicial review to a determination of whether there is basis in fact for the classification. *United States* v. *Seeger, supra; Dickinson* v. *United States,* 346 U.S. 389 (1953); *Estep* v. *United States,* 327 U.S. 114 (1946); *United States* v. *Jackson,* — F.2d — (No. 18,645, 6th Cir. March 24, 1969); *United States* v. *Beatty,* 350 F.2d 287 (6th Cir. 1965), *cert. denied,* 382 U.S. 1028. Mulloy relies upon *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967) and *Freeman* v. *United States,* 388 F.2d 246 (7th Cir. 1967), which cases were decided under the 1940 Act and involved different facts. We regard the cases as inapposite.

In considering whether to reopen the classification, the Board had the right to take into account the original questionnaire filed by appellant in June, 1963. In Series VIII of that form under the heading of Conscientious Objector he printed: "Does Not Apply." Since his registration in 1962 he had been granted five years' deferments for college and occupation, an appeal before the Appeal Board, the cancellation of two orders to report for induction, and then when time was running out for him, he claimed for the first time on October 30, 1967, that he was a conscientious objector. Even then he was still maintaining that he should be classified in 2-A because of his work in Appalachia, and he had not made up his mind as to whether he would go into the army.

A letter written to the Board by his brother, Robert, while disagreeing with Mulloy's position, stated:

> "I believe my brother to be sincere concerning his feelings and he has maintained this position for a number of years."

If this were true, why did he wait so long to inform the Board?

It would further appear that what he wrote to the Board about being under a $5,000-bond in the Federal Court was not correct.

We are of the opinion that there was a rational basis for the Board's determination that Mulloy had not established a case of conscientious objection, and that the Board did not abuse its discretion in denying his request to reopen his classification. In our judgment, he did not make out a prima facie case of conscientious objection, and the additional information that he supplied did not justify a change in his classification. *United States* v. *Jackson, supra.* His claim to conscientious objection did not fool the Board nor the District Judge who, in sentencing him, said:

> "It is the observation of this court that in the trial of this matter you have worn out pretty well the claim of conscientious objector, which I think the record should reflect you did not assert for many, many months.[1]
>
> "In other words, in my judgment, you have suffered an instant conversion when you realized that the platoon sergeant was about to blow his whistle."

In our judgment, the courtesy hearing granted did not constitute a reopening of the classification. Other claims of error have been considered and are insufficient to warrant reversal.

The sentence of the court would appear to us to be rather severe. We do not have before us the presentence investigation which may have justified it. The District Court will have an opportunity to consider reduction of the sentence if request is made under Rule 35 of the Federal Rules of Criminal Procedure.

Affirmed.

---

[1] It was about four years.

McCree, Circuit Judge, concurring. I concur in the result. Selective Service Regulation 32 C.F.R. § 1625.2 vests broad discretion in the Local Board, and since the Board was justified in considering the entire file (instead of being confined solely to appellant's conscientious objector application), I do not regard the decision not to reopen appellant's file as an abuse of that discretion. Accordingly, I find it unnecessary to consider the philosophical contours of conscientious objection in this appeal. I agree with the majority's statement questioning the propriety of imposing the maximum possible sentence in this case.

APPENDIX B

Order of the Court of Appeals Denying Petition for Rehearing

No. 18,709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
AUG 25 1969
CARL W. REUSS, Clerk

UNITED STATES OF AMERICA, :

Plaintiff-Appellee :

vs : ORDER

JOSEPH THOMAS MULLOY :

Defendant-Appellant;

Before WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

Entered by order of the Court.

Carl W. Reuss
Clerk

APPENDIX C

Pertinent Text of Statute Involved

Military Selective Service Act of 1967
[50 App. U.S.C. Section 451 et seq.]

50 App. U.S.C. Section 456 (j)

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and beliefs" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title.

50 App. U.S.C. Section 462 (a)

Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not

more than five years or a fine of not more than $10,000 or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

APPENDIX D

Pertinent Text of Regulations Involved

Selective Service Regulations
[32 C.F.R. Ch. XVI]

Part 1625–Reopening and Considering Anew Registrant's Classification.

Reopening Registrant's Classification

1625.1. Classification Not Permanent.–(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.–The local board may reopen and consider anew the classification of a registrant (a) upon the

written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3 When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class 1-S because he is satisfactorily pursuing a full-time course of instruction at a

college, university, or similar institution of learning.

1625.4 Refusal To Reopen and Consider Anew Registrant's Classification.–When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

Classification Anew

1625.11 Classification Considered Anew When Reopened.–When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 Notice of Action When Classification Considered Anew.–When the local board reopens the registrant's classifi-

cation, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

1625.13 Right of Appeal Following Reopening of Classification.–Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 Cancellation of Order to Report for Induction or for Civilian Work by Reopening of Classification.–The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.

APPENDIX E
Excerpts from Petitioner's Selective Service File

SSS Form 100

Approval not required.

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER
Mulloy, Joseph Thomas	15 47 44 153

Dates	Minutes of Actions	Vote Yes	Vote No
7-25-67	Order for Induction for Aug. 17, 1967 cancelled. Members	3	0
	permitted file to be forwarded to Appeal Board, even though		
	period of appeal had expired.		
7-25-67	File forwarde to Appeal Board		
8-24-67	Filed returned from appeal Board. Class. 1A by vote 5-0		
8-28-67	mailed SSS 110 (notice of class.) SSS 111 (class. advice)		
	to Mr. Thomas Rhodenbaugh, Bristol, Tenn.		
9/21/67	Mailed SSS 252, Order to Report for Ind., o. 10/10/67, SSS 127, DD 398 & instr., & DA Form 41.		
10/12/67 10-20-67	Order to report for induction on 10/16/67 cancelled. mailed SSS 140 (Spec. Form for C. O.)		
10/30/67	Registrant returned completed SSS Form 150. Also received		
11/9/67	letter requesting personal appearance. Registrant was granted a "courtesy personal appearance", classification was not re-opened. Board is to obtain additional information regarding appeal and bond.		
1-11-68	All information in file was considered including claim	4	0
	of Conscientious Objector. All Members present felt this		
	information did not warrant re-opening of 1A class.		
1-23-68	mailed SSS 252 (Ord. to rep. for Ind.Feb.23,1968) DD F 398 and Instr., Ky. Bar pamphlet, and SSS F 127		
2-27-68	papers returned from examining station--SSS 261 (Delivery		
	List) shows Refused Induction.		

Form approved.
Bureau of the Budget No. 33-R311

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service
Local Board No. 47
Room 106, VA Building
1405 W. Broadway
Louisville, Ky. 40203

(Local Board Stamp)

THIS FORM MUST BE RETURNED ON OR BEFORE
Oct. 30, 1967
(Ten days after mailed or issued)

Date of mailing or issue Oct. 20, 1967
Date received back at local board

1. Name of Registrant (Last)	(First)	(Middle)	2. Selective Service No.
Mulloy	Joseph	T.	15 47 44 153

3. Mailing address: Rt. 2 Box 928 (Number and street or R.F.D. route) Pikeville, (City, town, or village) Kentucky (County) (State) (ZIP Code)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

See appendix

SSS Form 130 (Revised 9-9-52). (The printing of 1-21-52 shall be used until exhausted.)

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

See appendix

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

See appendix

5. Under what circumstances, if any, do you believe in the use of force?

See Appendix

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

See appendix

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

See appendix

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended	
			From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked	
			From—	To—
See Appendix			19	19
			19	19
			19	19
			19	19
			19	19
			19	19

3. Give all addresses and dates of residence where you have formerly lived.

Name of City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence From—	To—
See Appendix			19....	19....
			19....	19....
			19....	19....
			19....	19....
			19....	19....
			19....	19....

4. Give the name and address of your parents and indicate whether they are living or not.

Mr. and Mrs. Joseph P. Mulloy; Living

5. (a) State the religious denomination or sect of your father Catholic

(b) State the religious denomination or sect of your mother Catholic

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a religious sect or organization? ☒ Yes ☐ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

Roman Catholic Church Pope Paul Rome, Italy

(b) When, where, and how did you become a member of said sect or organization?

In June of 1944 at Baptism

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

Due to the fact that I travel a lot and there are few Catholic Churches nearby I cannot maintain regular attendence. I am spiritually close to St. Anthony Church, Norton, Va.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

Fr. William Browne, St. Anthony Church, Norton, Va.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

Pope Paul said before the UN "No more war, no never again. If you wish to be brothers let the weapons fall from your hands."

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

I am working to improve the lot of the poor with the following organizations: VISTA, the OEO, the Highlander Education Center, the Council of Southern Mtns.; the Appalachian Volunteers, numberous community action programs, the Southern Conference Educational Fund, The Southern Student Organizing Committee, The Appalachian Group to Save the Land and People, the Marrowbone Flok School, JOIN in Chicago, the Glenmary Southern Project, and many more.

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

NAME	POST ADDRESS	OCCUPATION OR POSITION	RELATIONSHIP TO YOU
Fr. William Browne	St. Anthony Chur. Norton	Va. Priest	friend
Thorsten Horton	PO Box 2533 Pikeville,Ky	Teacher	friend
Carl Braden	3210 W. Broadway, Lou,Ky	Organizer	friend
Mrs. J. P. Mulloy	229 N. 37; Louisville,Ky	Housewife	mother

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Joseph T. Mulloy, certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing ATS (item, use pen) is my own handwriting.

Registrant sign here JTM

(Signature or mark of registrant)

(Signature of witness to mark of registrant) Oct. 26, 1967 (Date)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(Fact assisting registrant (such as inability to read and write English, etc.))

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

U.S. GOVERNMENT PRINTING OFFICE: 1950-O-774-000

APPENDIX TO SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

SERIES II – RELIGIOUS TRAINING AND BELIEF

2 My religious training taught me that it is against God's law to kill. To be a member of the Armed Services of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men.

Yes, my belief in a Supreme Being does involve duties to which I am superior to those arising from human relation.

3 I was born to Catholic parents on June 1, 1944, and was baptized into the Catholic Church shortly thereafter. I attended St. Anthony and St. Columbia grade schools in Louisville. I studied the Bible and the meaning of various stories and parables such as the prodigal son and parable of the vinyard. I learned the catechism, the sacraments, the Ten Commandments, and the life of Jesus. In short, I learned the basic rudiments of Christian teachings. In the sixth grade I became an alter boy and assisted the priests at Mass regularly. I even once served the Archbishop in an Easter observance.

Missionary orders such as the Glenmary and the Maryknoll used to visit my class often in the eighth grade to tell us of their work. I was inspired by them and decided to become a priest. However, by high school time I was not sure and decided to wait. I was a young lad,

knowledgeable in the teachings of Christ but still ignorant as to their real meaning or significance. I needed more experience.

I entered Flaget High in 1958. The Xaverian Brothers were quite a change from the Nuns. We concentrated not on rote memorization but on understanding the laws and mysteries of the Church. God's love for man was a constant theme.

The motto of Bellarmine College is "In the search of truth." By the time I enrolled in the school I had begun my own search for truth. I began to doubt and I fancied myself an agnostic, then an atheist. I was rebelling and I went through an extremely hard religious crisis. This religious crisis coupled with several failures in my personal life and the sudden illness of my father caused me to despair. I attempted suicide.

During my recovery I began to read and grow again. I reenrolled in college and came back to the Church. I discovered Thomas Merton in a Monastery near Bardstown. Through his writings and poems he quickly became my mentor and spiritual advisor. I devoured everything that he wrote and found a great similarity between our lives and thoughts. An internal struggle was being waged inside of me again. I felt I was being pulled to the monastic life. Merton had chosen the life of prayer, the life of solitude. He was the outstanding example that the materials of this world were meaningless. He said that man must conquer himself before he could know fulfillment. Merton was non-violent. He was a hermit. He was "drunk with God."

I was attracted and deeply influenced. Many times I went to the Monastery to gaze at the gray walls, to walk in the garden and to be near the men who live but for God.

About this same time, 1965, I became involved with the Appalachian Volunteers. I jumped into this work with missionary zeal, determined to right the injustices. I was an organizer. Imbued with a sense of history and determined that I was right I threw myself into my work.

I found that this was the point that Merton and I differed on. He was a contemplative. He found his way to God in solitude and prayer. But I was an activist, a worker in the world. I found my solace and comfort in people. This was my path.

As I have tried to show my religious training has taught me basic laws of God. Love of God in every man is the supreme goal.

As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church attendance. And I place Thou Shalt Not Kill above An Eye For An Eye. I learned rapidly in my work in the southern Highlands of the significance of love and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way.

Violence only breeds violence.

As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and to love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO.

4 Thomas Merton, Gethsthemini, Ky., Jesus Christ.

5 I believe in the force of non-violence.

6 I am spending my life non-violently working among the poor. When I helped organize Jink Ray's resistance to strip mining I urged non-violent methods. I was successful and bloodshed was averted in a very tense situation. I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam.

7 I have trained many groups of VISTA volunteers for work in Appalachian communities. I had several occasions to tell such groups that non-violent change was what was needed in East Kentucky. I led discussions on non-violent organizing techniques. I have talked and expressed my views on this subject privately many times to my wife and friends. And I stated under oath in the U.S. 6th District Federal Court in Lexington in September of this year that I did not advocate the violent overthrow of any government. I stated I believe in the peaceful means provided for in the Constitution and the democratic process.

APPENDIX TO SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

SERIES III-- GENERAL BACKGROUND

1.

School	Type	Location	Dates
St. Anthony	Church	Louisville,Ky.	1950-51
St. Columbia	Church	Louisville,Ky.	1951-58
Flaget High	Church	Louisville,Ky.	1958-62
Bellarmine College	Church	Louisville,Ky.	1962-63
U of Louisville	Public	Louisville,Ky.	1963-64
U of Kentucky	Public	Lexington, Ky.	1964-65
U of Louisville	Public	Louisville,Ky.	1965-66

2.

Work	Employer	Address	Dates
Organizer	Council of Southern Mts.	Berea,Ky.	Jan-June,'66
Organizer	Appalachian Volunteers	Bristol,Te.	June '66-Now
Teacher	Highlander Education Cen	Knoxville	1966-Now

3.

Town	State	Address	Dates
Pikeville	Ky.	Box 928,Rt. 2	Mar. 67-present
Wise	Va.	Box 151 Rt. 1	Nov 66-Mar 67
Norton	Va.	1522 Main Ave.	Jul 66-Nov 66
Bristol	Tenn.	102 19th St.	May 66-Jul 66
Berea	Ky.	102 Boone St.	Jan 66-May 66
Louisville	Ky.	229 N. 37 St.	until Jan 66

Oct 17, 1967
Box 928 Rt. 2
Pikeville, Ky.

Selective Service System
Local Board No. 47
1405 W. Broadway
Louisville, Ky.

Dear Sir,

I am writing to formally request a conscientious objector application form. I wish to file a CO claim.

After much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector. I am therefore opposed to war in any form.

In my studies of history I have found a strong correlation between religious practices and political realities. In essence the two are almost interchangeable. The prevailing religious attitude of a certain age almost consistently justifies the politics of that age. And when the politics of men demand new conquests or an expansion of the economy the religion was tailored to the situation. I point out the Crusades, the settlement of the American West, and the Vietnam War as three easy examples. The Crusades were launched under the guise of returning the Holyland to the Christians; the atrocities committed in the West were done under the banner of "Manifest Destiny" with bible quoting missionaries leading the way; and the most inhumane of all wars, the one in Vietnam, is justified as a stand against godless communism.

When I was a small child I was taught that men should love their fellow man and Thou Shalt Not Kill. But a child is taught many things and few have any real significance or understanding until the child reaches adulthood. The adult begins to move about in the world testing his early lessons, discarding some, keeping others until with maturity he forms his personal beliefs.

My adult experience has caused me to testseverelymany of my early teaching. The gross injustices in society have caused me to question my own existence, the dishonesty and greed of the politicians in Eastern Kentucky have made me angry, and the horror's of war have thrilled me at the moves and privately made me shiver.

I have been taught, I have experienced, and I have decided I cannot, I wil not, participate in the injustices, the killings, and the wars. I will adhere to the basic teaching of Jesus and do everything I can to promote peace, understanding and Love. It is with these thought in mind that I request to be classified a conscientious objector.

For your interest I am still employed by the Appalachian Volunteers, Inc. Present projects include stopping strip mining, establishing a welfare rights organization, and research on absentee owned coal fields.

Also inclosed is a newspaper which will give you some background on the sedition charge along with literature on an anti-war demonstration which I am planning to attend.

Please send the CO form.

Sincerely,

Joseph T. Mulloy
15-47-44-153

Nov. 12, 1967

Selective Service
Local Board No. 47
Louisville, Ky.

Dear Sir:

I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.

These are certainly troubled times in this country. There are millions of black people and poor white people who have never had a say about any thing they are beginning to organize. They are beginning to organize for freedom and equality, the two great principles of the Bill of Rights. But this struggle is hitting head on the capitalist ruling class that has disregarded our Constitution for the profit motive. I believe that another revolution is beginning to take place in this country, that this country's government can no longer deal with its internal problems.

I of course hope that this revolution takes a non-violent form. It is important that men begin now to understand each other. That is why I hope that you understand me. You have me over the barrel, so to speak, in that you have the law behind you. But I remind you that I am an organizer. That I have dedicated my life to change and to the constant struggle that is democracy. There is nothing that can stop me

from organizing against something I don't believe.

This brings us to the war in Vietnam and my draft situation. I do not question individual integrety or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.

I told you I felt that I was serving my country's needs here in Pike County. That was no frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think.

I know that I will eventually face prison. I am not afraid of that. Greater men than I have pulled time for practicing what they believe. When Emerson visited Thoreau in jail for not paying taxes to the Mexican War he asked "What are you doing in there?" Thoreau answered "What are you doing out there?"

It is a sad time but what must be must be. Before now I have not done any draft organizing. I have restricted myself to work with the dispossessed coal miners of Appalachia. But I believe it to be the same battle.

I submit this to you representing the government with all due respect.

Sincerely,

Joseph Mulloy

Saint Anthony's Church
Norton, Virginia 24273

St. Mary's Church
Coeburn, Virginia

St. Joseph's Church
Clintwood, Virginia

October 30, 1967

Local Board No. 47
1405 W. Broadway
Louisville, Kentucky

Re: 15-47-44-153

Dear Sirs:

This letter is a request on the behalf of Joseph T. Mulloy. I request that you consider his position that he finds participation in war as morally offensive to his conscience and therefore be granted a classification as a conscientious objector.

I am personally acquainted with Joseph T. Mulloy and can attest to his moral integrity and veracity. His personal conscience finds that participation in war is incompatible with his moral convictions, consequently, military service would do violence to his conscience.

The Catholic Church has always maintained that participation in a just war is morally defensible. However, moral

theologians and the Church, in particular, has always insisted that each individual must follow his own conscience. This is the basic moral principle in Catholic moral theology. Consequently, even in view of overwhelming approval in a given moral consideration the Church has always respected the convictions of the individual conscience.

In view of my personal association with Joseph T. Mulloy and our Church's defense of the inviolability of the individual's conscience, I request that you grant the registrant a draft classification as a conscientious objector.

If further clarification is necessary in this matter I will be happy to appear personally before your Board to answer any questions.

Respectfully yours,

(Rev.) William F. Browne

October 27, 1967

Thorsten Horton

Box 2533
Pikeville, Kentucky

Kentucky Local Board Number 47
Selective Service System
1405 West Broadway
Louisville, Kentucky

Re: Mr. Joseph Mulloy, Box 928, Route No. 2, Pikeville, Kentucky

Dear Sir:

Mr. Mulloy has asked me to be a reference for his sincerity in requesting status as a conscientious objector.

I met Joe Mulloy in the Fall of 1966 in connection with developing a field study project in Southern Appalchia for college students. From this first meeting until the present time, including his experience in the courts involving sedition charges, I have observed in Joe Mulloy what I would call genuine Christian love and concern for the Christian brotherhood of Man. In my estimation, Joe could not have endured the persecution he received related to his court experience if he had not had faith in the goodness of Man.

In the recent encounter involving the Appalachian Group to Save the Land and People and the Puritan Coal Company,

Joe Mulloy demonstrated his belief in nonviolence by convincing members of the Appalachian Group to leave their arms at home, thus avoiding what could have been a terrible waste of human life.

Please feel free to write or call–(606) 432-3189.

I sincerely hope that you will honor his request.

Sincerely,

Thorsten Horton
Director of the Appalachian Field Study Center (A Project of the Union for Research and Experimentation in Higher Education)
Visiting Instructor at Pikeville Coll.

TH/mh

APPENDIX F

Excerpts from Transcript of Proceedings,
Mulloy v. Selective Service Board
No. 47 et al., U.S. Dist. Ct., W.D.Ky., February 16, 1968
Hon. Henry L. Brooks, U.S. District Judge

J. ALLEN SHERMAN - RECROSS EXAMINATION

Q. Is it your position that the statements that Mr. Mulloy made in SS Form 150 and the statements that he made on the interview and the supporting letters that were sent, even if true, would not justify a reopening of his classification?

A. Taking everything that he – he did not make out – his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.

Now, I went over his 150 Form. What's in it, now, I couldn't tell you. I don't know. And I don't know what's in the other registrants' file. His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.

Q. Then you based – then are you saying that you based your decision not to reopen on the testimony he gave at the oral interview rather than the answers he gave on SSS Form 150?

A. We try to base all our decisions on all the information available, including the file and what he says.

Q. Is it your position, then, that on all the information available, that is, his testimony at the hearing, SS From 150

and whatever other information you had in his file, he did not make out a prima – a case for Conscientious Objector Status?

A. I didn't follow you on your whole question.

Q. Is it your position that on all the information that you have, that is, his testimony at the hearing, his answers on SS Form 150 and other information in his file, this did not make out a case that he was entitled to a deferment?

A. Well, I think the file speaks for itself. The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished us, the letters he had sent in with his 150 Form and the information that he had given when he appeared in person.

Q. And that all of this, even if true, would not have entitled him to have his classification reopened?

A. All the information that we had, we came to the conclusion as we recorded on the file.

Q. Thank you. That's all.

A. Yes, sir.

(WITNESS EXCUSED)

APPENDIX G

**Excerpts from Transcript of Proceedings,
United States of America v. Joseph Thomas Mulloy,
U.S. Dist. Ct., W.D.Ky., April 5 1968
Hon. James F. Gordon, U.S. District Judge**

* * * * * * * * * * * * * *

MRS. MARGARET GREEN, called as a witness, by the plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

* * * * * * * * * * * * * *

CROSS EXAMINATION BY MR. SEDLER

***

Q. So that a registrant who is classified as 1-O then has a special proceeding before the Board?

A. That's right.

Q. At which time he then receives an order to report for civilian work?

A. That's right.

Q. Do you recall any such proceedings within –

A. (Interrupting) I have never had one in my Board.

Q. You have never had one in your Board?

A. (Witness shook in the negative.)

Q. Where a registrant was ordered to report for civilian work?

A. No, I have not.

MR. SEDLER: Thank you; no further questions.

* * * * * * * * * * * * * *

MR. ROBERT T. DOWNES, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. At the time, or I should say prior to the time of the meeting, this was the first time that you were aware of Mr. Mulloy?

A. I had never met him.

Q. You had never met him. Were you aware that he was a registrant of your Board?

A. No.

Q. No. Prior to the meeting did you read his file, his

Selective Service file?

A. The file is available before he presented himself, yes.

Q. And you read it?

A. I scanned it because I am the newest member on this particular Board and I was not familiar with what was in his file at all.

Q. You weren't. You just scanned the file then?

A. (Witness nodded his head in the affirmative.)

Q. When a registrant claims classification as a Conscientious Objector he must complete SS Form 150, must he not?

A. I believe this is the procedure, yes, sir.

Q. Do you know if, when you went through Mr. Mulloy's file, did you find that he had completed the SS Form 150?

A. I couldn't say.

Q. You don't remember that?

A. No, because as I recall his file was fairly thick.

Q. Fairly thick.

A. And I'm not familiar with the various forms by the particular numbers.

Q. Well, you knew though that applicants for Conscientious Objector status must complete a special form; is that correct?

A. Yes.

Q. Did you read, then, the form that he had filled out, his form for classification, as a Conscientious Objector?

A. I don't remember.

* * * * * * * * * * * * *

Q. During the time that you have been a member of the Board do you recall how many requests for Conscientious Objection status have been made before the Board?

A. Except in a general way, there have been very few.

Q. Have you – do you recall any of these requests having been granted?

A. A change in status?

Q. No, given the status of a Conscientious Objector, a 1-0 classification?

A. I don't recall of any.

Q. You don't recall of any of that being – any of that being done?

A. No.

Q. Do you recall the interview with Mr. Mulloy on November 9th?

A. Yes, I remember that he did appear before the Board.

Q. He did appear. You don't remember if you had read his file before he appeared?

A. I did not read each sheet in his file; the file was there.

Q. You don't remember if you read his answers to the form required by conscientious objectors; is that right?

A. That's correct.

Q. Did you feel that you could make a judgment without having read thoroughly his answers to the form?

A. There was no judgment required at this particular time.

Q. Oh, so that no judgment was made on November 9th; is that correct?

A. No, I – you asked if I had read the file before he appeared.

Q. Oh, well, you did read it that evening while he was –

A. (interrupting) No, at the time the Board met the file was there and there were several members of the Board present at this particular time and the clerk had informed us that we had a person who had requested to appear before the

Board.

Q. So, this was the first time you knew of this?

A. Knew of what?

Q. That Mr. Mulloy was trying to be claiming status as a Conscientious Objector?

A. Yes, and –

Q. (Interrupting) And – I'm sorry; continue.

A. And at that time, the clerk said that the individual was waiting – was there, and all of the Board members, I believe, or those who cared to looked in the file, but as far as reading each separate sheet is concerned, I don't believe that I did this.

Q. We are not concerned about each special sheet. I am concerned about what we call the SS Form 150 which is the special form for Conscientious Objectors that all applicants for this status must complete. You don't recall reading that?

A. Not specifically.

Q. Not specifically. How long did the interview last with Mr. Mulloy that evening; do you recall?

A. It's a fairly short time.

Q: About ten minutes?

A. I'd say ten, fifteen minutes, something like that; something in that neighborhood.

Q. Ten, fifteen minutes; and did you ask Mr. Mulloy any questions at that time?

A. As I recall, Mr. Mulloy did all of the talking.

Q. Mr. Mulloy did all of the talking and you didn't ask him any questions?

A. No, I don't recall that I did.

* * * * * * * * * * * * *

Q. Very well; you were aware Mr. Mulloy was seeking to be classified as a Conscientious Objector; is that correct?

A. On the basis of what he submitted to the Board when he appeared before us.

Q. Yes, and you understand – you are thoroughly familiar with the law – let's say with the regulations governing the classification of Conscientious Objectors?

A. I can't say that I'm thoroughly familiar. As indicated to you before, I am perhaps the youngest person on the particular Board, I don't know whether this pertains in this case or not, but ordinarily when the meets we go through whatever the cases are that are before us, what is presented, and then we act on this, but I could not quote to you in terms of –

Q. (Interrupting) I don't mean to quote; I would just like a general – if you have a general understanding of what a conscientious objector is and the policy of your draft Board concerning conscientious objectors?

A. In a general sense, yes.

Q. Would you tell us what this is?

A. Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity.

Q. Well, the draft Board has to make that decision, doesn't it? He can't do it just on his own.

A. The draft Board, I thought now, was involved primarily with determining the availability of people.

* * * * * * * *

Q. How much time would you say that you spent reviewing Mr. Mulloy's file prior to the January 11th meeting?

A. I don't know; the only –

Q. (Interrupting) Ten minutes?

A. The only time that I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started.

Q. Before the meetings; in other words, you wouldn't take it home and study it carefully?

A. No.

Q. Now, you are prepared to state under oath, that you feel that you gave full and fair consideration to his claim; is that correct?

A. I believe so, on the basis of what was discussed, what we were able to glean from his own statements.

* * * * * * * * * * * * * *

MR. FRANK J. WOLKING, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. Prior to the meeting of November 9th did you go through his file?

A. If his file came up I went through his file, but I wouldn't recall having specifically gone through his file.

Q. You wouldn't recall. Well, you knew his case was coming up?

A. I knew his – I knew he was coming to visit, coming to the Board for a hearing.

Q. Did you know that he had requested a reopening of his classification so that his claim for Conscientious Objector status could be considered?

A. I knew that Mrs. Green, the Board's secretary, had told us that he had asked for a courtesy hearing and it wasn't a regular hearing, but he wanted to come and make some statements and that's all I knew.

Q. So, you did not know at that time that he was acting for Conscientious Objector classification?

A. No.

Q. Then, you did not go, prior to the hearing, read thoroughly his responses to the SS Form 150?

A. I would say I absolutely did, but I wouldn't recall having done it.

Q. But if you did –

A. (Interrupting) If his case came before the Board I would have read whatever was in the Form 150.

Q. The Selective Service Form 150?

A. That's right.

Q. And your conclusion after reading – how much time did you spend on that form, would you estimate?

A. I wouldn't recall that.

Q. Your conclusion after reading that form was that this did not entitle him to a reopening of his classification?

A. That is correct.

Q. How long did the interview last at that time?

A. I wouldn't recall that either; possibly ten or fifteen minutes.

Q. About ten or fifteen minutes; and what questions – do you recall what questions you asked Mr. Mulloy that evening?

A. No, I don't think that I asked him any questions and I don't remember any.

Q. You don't think you asked him any questions?

A. I don't think I did.

Q. Do you recall any members of the Board asking him any questions?

A. No, I don't.

* * * * * * * * * * * * * *

* * * * * * * * * * * * * *

CROSS EXAMINATION BY MR. HUDDLESTON

Q. As I understand it then, you did not inquire into his sincerity, but the prima facie case that he presented?

A. That is quite true.

Q. Assuming that he was sincere?

A. We assumed he was sincere, that's right.

Q. You stated that he talked about or based his claim on the importance of his work in Appalachia?

A. That is the impression I have or that is the impression I remember.

Q. He was asking for a Conscientious Objector status because he had important work in East Kentucky?

A. That's right.

* * * * * * * * * * * * * *

REDIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. Now, if an individual makes this statement and the Board agrees with him, that is, it finds as a fact that he is by reason of his religious training and belief conscientiously opposed to participation in war in any form and further, conscientiously opposed to participation in noncombatant training and service in the Armed Forces, what happens?

A. How do you mean what happens?

Q. What classification does he get?

A. Well, if the Board doesn't consider this he stays in this 1-A.

Q. Now, if the Board considers it favorably, what classification does he get? If the Board considered Mr. Mulloy's claim favorably, what classification would he have been given?

A. (No response)

Q. Well, what classification would he be given?

A. I believe I'm correct in stating that he would be offered a position in some hospital or some work that would permit him to serve in some other manner.

Q. Right, so that by signing this statement then Mr. Mulloy would have indicated his willingness to perform civilian service in the national interest?

A. Well, I believe it says he wouldn't, doesn't it? Isn't that correct?

Q. No, where does it say that he wouldn't perform this?

A. I therefore claim exemption from both combatant and noncombatant training and service in the Armed Forces.

REDIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * *

THE WITNESS: I mean everything that was in the Form 150 and everything he said, in other words, everything was taken into consideration in the record and that's what my decision was based on.

Q. And that even – in other words, you did not question his sincerity, I take it?

A. That is correct.

Q. You believed his sincerity – you believed that everything he said, even if true, would not entitle him to be a

conscientious objector?

A. Everything that was in the record and what he said.

* * * * * * * * * * * * * *

MR. ROBERT H. RICKERT, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. When did you first become aware that Mr. Mulloy was registered before your Board?

A When he was registered.

Q. Yes. When did you identify – when did you know that a fellow named Mulloy was a registrant before you?

A. Possibly it was called to my attention on the 11th, the second meeting, in January.

Q. Oh, then you were not at the meeting of November 9th when Mr. Mulloy was –

A. (Interrupting) I was not at that meeting.

Q. Did you discuss the action at the meeting of November 9th with any members of the Board or with the clerk?

A. Only at meeting on January – in January.

Q. So that you were not aware prior to January 9th that Mr. Mulloy's case was going to come up that evening (sic)?

A. No.

Q. Oh, then you had not read his responses to the SS Form 150?

A. No.

Q. I see. Well, the record of minutes shows that at that

meeting, the meeting of January 9th (sic) the Board voted four to nothing that his classification – that his classification should not be reopened, did you not at that time?

A. Yes.

Q. Well, how could you vote if you hadn't read his file?

A. I read his file at that day and I reviewed the case with the other members of the Board.

* * * * * * * * * * * * * *

REDIRECT EXAMINATION BY MR. SEDLER

Q. Let me ask you an additional question; you have stated that you had no personal feelings against Mr. Mulloy?

A. Right.

Q. Did you have any feelings against Mr. Mulloy due to the fact that he had asked for classification as a Conscientious Objector?

A. No, no more than any of the rest of the registrants who had asked for that.

Q. You say other registrants have asked for it?

A. At times, at different times, yes.

Q. Do you recall the last time that a registrant asked for that classification?

A. No, no.

Q. You do not?

A. No.

Q. Do you recall in your tenure of service that the Board has given anyone a classification as a Conscientious Objector?

A. Yes.

Q. But you don't recall the name of that individual?

A. No.

Q. And that – but this was done and this person was

ordered to perform civilian work?

A. Yes.

* * * * * * * * * * * * * *

MR. J. ALLEN SHERMAN, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. SEDLER

* * * * * * * * * * * * * *

Q. You have been on the Board since 1948?

A. Approximately.

Q. During that time – strike that.

Let me ask you this; what is your understanding of a conscientious objector?

A. My understanding of a conscientious objector – it's pretty much spelled out in the regulations, I believe, and my understanding of it would be one who has conscientious scruples against taking another person's life even under any circumstances.

Q. Does participation in war in any form –

A. (Interrupting) That's correct.

Q. Now, there is another classification is there not also, a class 1-A-0, opposed to the participation in combat, but will so perform noncombatant service?

MR. HUDDLESTON: Objection, this is inquiry into the law itself which is not a jury question.

BY THE COURT: Well, I will let Mr. Sherman answer it if he can.

THE WITNESS: Repeat the question, please.

Q. The question is, I mean is there also not a classification of 1-A-0 where the person is opposed to participation in combat, but is willing to perform noncombatant military service?

A. I'm not certain about that, whether there is a special classification or not. I don't mean – I know many of them do perform that sort of a service within the Army themselves. Now, whether this is a classification for it under Selective Service or whether that is designated by the Army, I wouldn't be certain about that.

Q. But Mr. Mulloy did not ask for that; he indicated he was opposed to participation in war in any form.

A. That's correct, as I recall it.

Q. When a registrant is classified as a Conscientious Objector, opposed to participation in war in any form, what happens? What disposition is made of that if you would have granted the classification to Mr. Mulloy that he sought?

A. As a Conscientious Objector?

Q. Yes.

A. He'd be classified as a 1-A-0 classification. He would be given an opportunity to serve in some institution of his choosing for a period of, I believe it is two years which he would have the choice of making an institution within a given group.

Q. You testified that you have read – you had read Mr. Mulloy's file prior to the meeting of November 9th?

A. I reviewed his file at that meeting.

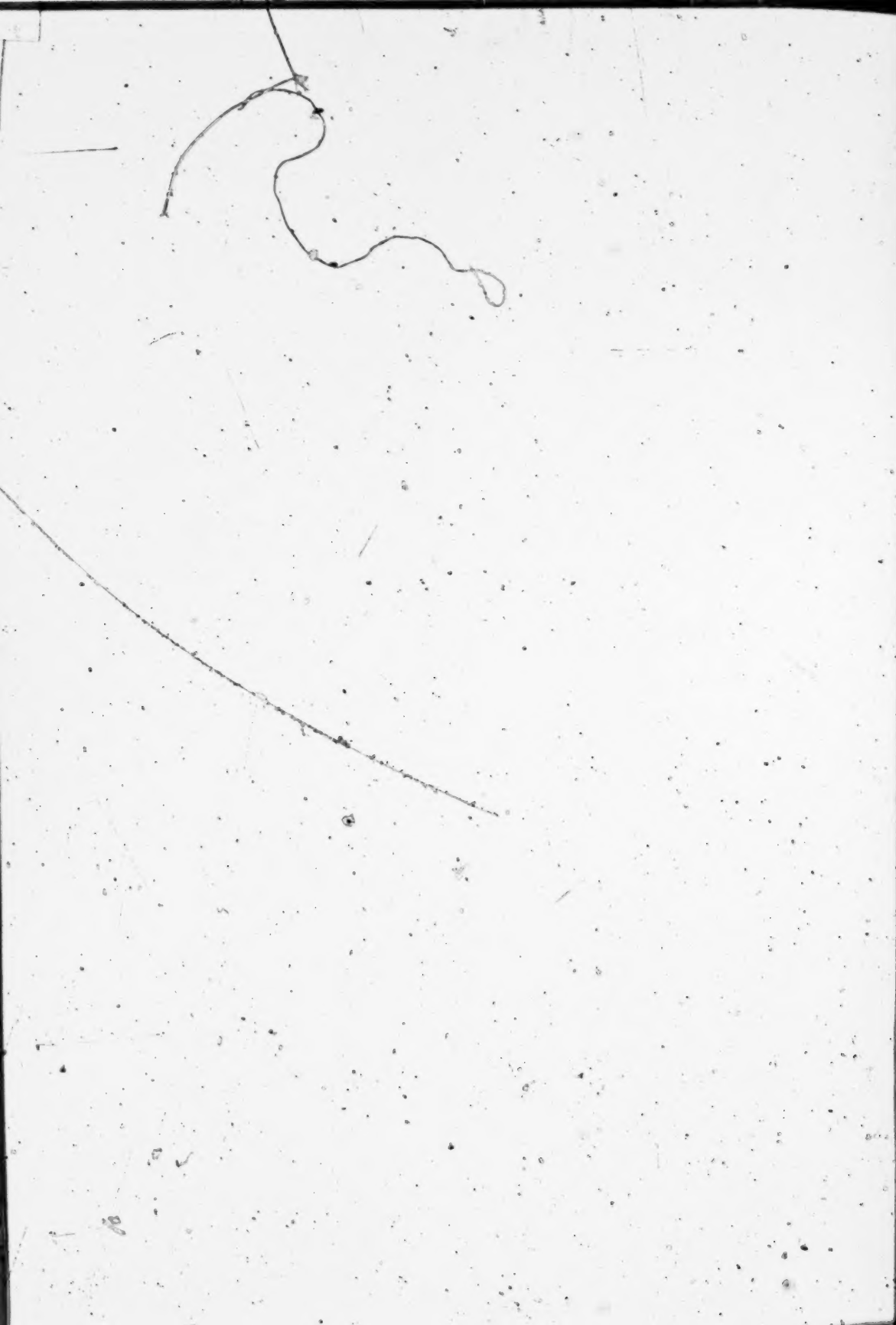
Q. At that meeting; you had not considered it prior to the meeting?

A. Well, I am sure his file came up for consideration on other matters prior to that time.

Q. Not his claim for Conscientious Objector status?

A. No, sir; that came up at that time. We looked it over before he came in as we do anybody else.

* * * * * * * * * * * * *



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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 412 F. 2d 421.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1969, and a petition for rehearing was denied on August 29, 1969 (Pet. App. 12a). The petition for a writ of certiorari was filed on September 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the local board abused its discretion in refusing to reopen petitioner's classification as a result of his claim to conscientious objector status.

2. Whether, since a registrant whose claim to conscientious objector status is denied at the time of his original classification is entitled to appeal administratively from the denial as of right, and a registrant whose claim is denied following reopening and reconsideration of his classification can similarly appeal from the board's decision of the claim on its merits, it is a denial of due process to refuse the right of appeal to one whose request for reopening is denied because he has failed to present a *prima facie* case of entitlement to that status.

3. Whether the local board failed to consider petitioner's request for conscientious objector status fully, fairly, and competently.

STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of failing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (R. 2; Tr. 203).[1] On April 8, 1968, he

[1] The record on file in the Clerk's office consists of the record of the criminal proceeding proper and that of a related civil proceeding (a pre-induction suit by petitioner for injunctive relief), which by stipulation (see Pet. 7-8) was treated as part of the record in the criminal case. (The district court denied the injunctive relief sought and, following petitioner's refusal

was sentenced to five years' imprisonment and fined $10,000 (R. 20). The court of appeals affirmed.

Petitioner registered with Local Board No. 47, in Louisville, Kentucky, on June 13, 1962. In June 1963, he completed and returned to the board his classification questionnaire, in which, under the caption "Conscientious Objector," he wrote "Does Not Apply." On November 22, 1963, he was classified II-S (college student deferment), and he remained in that classification until March 17, 1966. On the latter date, at his request, he was given a II-A (occupational deferment) classification, to expire in March 1967, on the basis of his employment by Appalachian Volunteers, Inc., an anti-poverty organization funded by the Office of Economic Opportunity (Pet. App. 2a; G.A. 2; G. Ex. 1).

On March 1, 1967, petitioner advised the local board by letter that he was still employed by Appalachian Volunteers, described and stressed the importance of his work, and requested renewal of his II-A deferment. Petitioner's supervisor similarly requested that the board allow petitioner to "con-

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to submit to induction and the commencement of the criminal prosecution, his appeal from that judgment was dismissed as moot (see Pet. 8).) "R." refers to the clerk's record of the criminal proceeding proper; "Tr." to the transcript of the criminal trial; and "G. Ex. 1" to petitioner's Selective Service file (Government Exhibit 1 at trial). Most of the relevant portions of the record appear in the Appendix to the petition for a writ of certiorari or in one or the other of the appendices to the briefs in the court of appeals. We are accordingly lodging herewith copies of the two latter appendices. "A." refers to petitioner's appendix; "G.A." to the government's.

tinue his vital role" in the organization's program. On May 11, 1967, in accordance with its policy of limiting deferment in such cases to one year, the board denied the requests and reclassified petitioner I-A. Petitioner was advised of the reclassification on May 16, 1967 (Pet. App. 2a; G.A. 2-5; G. Ex. 1).

On May 17, 1967, petitioner was ordered to report for a pre-induction physical examination on June 26, 1967. On May 23, 1967, the local board received a letter from petitioner dated May 19, 1967, addressed to "Appeals Board, Selective Service, Local Board No. 47," in which he said that the letter was "an official appeal to you to review and reconsider my request for an occupational deferment." Noting that he had previously been classified II-A on the basis of his work for Appalachian Volunteers, petitioner wrote that he was more deeply involved than ever in his work and that he felt that at least one more year would be needed to achieve satisfactory results. Due to the temporary absence of the clerk of the local board, no immediate reply was made to that letter. On June 26, 1967, petitioner was examined and found qualified for induction (Pet. App. 2a; G.A. 6-7; G. Ex. 1).

On July 3, 1967, the clerk of the local board wrote petitioner that the board had not overlooked his letter of May 19 and inquired whether petitioner wished the board to "first review your file and then forward [it] to the Appeal Board" or whether he desired merely that it be forwarded to the appeal board. On July 10, 1967, petitioner replied that he did not fully understand the procedures to which the clerk

had referred. Noting that he had been reclassified I-A in May 1967, he said that he had "appealed" that classification "on the grounds of occupation" and "asked for a renewal of" his II-A deferment. He requested the board to "do what is necessary to reconsider my classification" (Pet. App. 2a; G.A. 7-8).

On July 17, 1967, petitioner was ordered to report for induction on August 17, 1967. On July 20, 1967, he wrote the local board that he had been advised by counsel that the order to report for induction was invalid because he had had a timely appeal outstanding since May 23, 1967. He requested that the induction order be canceled, that the appeal be forwarded to the appeal board, and that he be granted a personal appearance before the local board. The board denied his request for a personal appearance because the request had not been made within thirty days after the notification to him of his I-A reclassification, as required by 32 C.F.R. 1624.1(a). On July 25, 1967, although petitioner's time within which to appeal had expired, the local board, because of the apparent misunderstanding as to whether petitioner had intended his May 19 letter to be an appeal or simply a request for reconsideration by the local board, canceled the order to report for induction and forwarded the file to the appeal board. On August 16, 1967, the appeal board, by a 5-0 vote, classified petitioner I-A (Pet. App. 3a; G.A. 10-11, 12-13, 39; G. Ex. 1).

On September 5, 1967, petitioner advised the local board by letter that he had been arrested on August 12 and charged with sedition against the State of

Kentucky; that the case was then pending in the United States District Court for the Eastern District of Kentucky, at Lexington (in a proceeding to enjoin the State prosecution; see Pet. 5 and *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.)); and that he would keep the board advised of developments. On September 21, 1967, petitioner was again ordered to report for induction, on October 16, 1967. On October 9, 1967, petitioner advised the board that his "legal complications" had not been resolved; that he was "still under $5,000 bond" to the federal court in Lexington; that the decision of the federal court (enjoining the State prosecution) still might be appealed, in which event the case "could drag on for several more months"; and that in addition he was under bond in the amount of $250 to a court in Pike County, Kentucky, on a still-pending charge relating to a deadly weapon. He accordingly asked the board to cancel the induction order. On October 12, 1967, the board canceled the induction order and advised petitioner that since he was "under the jurisdiction of the Court" he would be considered for a IV-F classification. (Pet. App. 3a; G.A. 15, 17, 19).

On October 17, 1967, petitioner advised the local board that after much thought he had come to the conclusion that he was a conscientious objector and asked the board to send him the special form for claiming that status (Pet. App. 30a-31a). The board sent him the Special Form for Conscientious Objector (SSS Form 150), and he completed and returned it on October 30 (Pet. App. 20a, 21a-29a).

Petitioner stated in the form—by signing a printed declaration which so asserted—that he was conscientiously opposed by reason of religious training and belief to participation in war in any form (Pet. App. 21a; G. Ex. 1). He said that he believed in a Supreme Being; that the belief involved duties superior to those arising from any human relation; that his religious training had taught him that it was against God's law to kill; and that he believed in Jesus' message of love for all mankind (Pet. App. 21a, 25a). In response to the inquiry as to how, when, and from whom he had received the training and acquired the belief upon which his claim was founded, he said that he had been born and reared a Catholic; that, after going through a religious crisis in college in which he had fancied himself an agnostic and an atheist, he had returned to the Catholic Church; and that he had been greatly influenced by the writings of Thomas Merton, who, he said, was non-violent, but that, whereas Merton was a hermit and a contemplative, petitioner was an activist and an organizer, determined to right the injustices of the world. He had learned in his work in the Appalachians of the significance of love and understanding and the futility of force and violence; that too many poor people had been used and walked on by the power-hungry courthouse gangs; that there was an urgent need for the poor to become organized and for the rich to be educated; and that this must be done in a non-violent way. Although as a young man he had not been taught to be against the use of violence as such, he said, he had been taught not to kill and to love all

men. He concluded: "This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO" (Pet. App. 22a, 25a-28a).

In response to the form's inquiry as to the circumstances, if any, under which he believed in the use of force, petitioner said that he believed "in the force of non-violence" (Pet. App. 22a, 28a). Asked to describe the actions and behavior in his life which most conspicuously demonstrated the consistency and depth of his religious convictions, he wrote that he was spending his life non-violently working among the poor; that he had once successfully urged non-violent methods while helping to organize resistance to strip mining; that as a consequence of that appeal bloodshed had been avoided in a tense situation; that he had supported peace demonstrations to end the conflict in Vietnam; and that he had written letters to his Senators and signed a petition to the President urging a negotiated peace in Vietnam (Pet. App. 22a, 28a). In reply to an inquiry as to when and where, if at all, he had given public expression to the views relied upon as the basis of his claim to being a conscientious objector, he said that he had trained groups of VISTA volunteers for work in Appalachian communities; that he had on several occasions told such groups that non-violent change was what was needed in Eastern Kentucky; that he had led discussions concerning non-violent organizing techniques; and that he had testified in the federal proceeding arising out of the sedition charges against him and others that he did not advocate the violent

overthrow of any government (Pet. App. 22a, 28a). Asked to describe carefully the creed or official statements of the religious sect to which he belonged in relation to participation in war, he wrote that Pope Paul had said before the United Nations: "No more war, no never again. If you wish to be brothers let the weapons fall from your hands" (Pet. App. 23a).

Reverend William F. Browne, pastor of a church to which petitioner said he was spiritually close, and whose name petitioner submitted to the board as one who could give information as to the sincerity of his professed convictions against participation in war, advised the board by letter that petitioner was a person of moral integrity and veracity; that because petitioner's "personal conscience finds that participation in war is incompatible with his moral convictions, * * * military service would do violence to his conscience"; that the Catholic Church had always maintained that participation in a just war is morally defensible but at the same time had insisted that each individual must follow his own conscience; and that in view of the Church's defense of the inviolability of the individual's conscience he supported petitioner's request to be classified as a conscientious objector (Pet. App. 23a, 24a, 35a-36a).

Thorsten Horton, a friend of petitioner who had directed a field study project in "Southern Appalachia," and whose name petitioner also gave the board as one who could vouch for the sincerity of his convictions, wrote to the board that he had observed in petitioner "genuine Christian love and concern for the Christian brotherhood of Man"; that petitioner

could not have endured the persecution he had received arising out of his recent court experience in the sedition case if he had not had "faith in the goodness of Man"; and that in a recent encounter between a coal company and an organization called the "Appalachian Group to Save the Land and the People," petitioner had demonstrated his belief in non-violence by persuading members of the group to leave their arms at home, thus averting "what could have been a terrible waste of human life" (Pet. App. 24a, 37a-38a).

Carl Braden, another friend of petitioner whose name he submitted as a reference, advised the board by letter that petitioner was a conscientious person who was working hard to help bring about a better world for the poor in the mountains of Kentucky; that petitioner believed that peaceful action is the way to solve problems and that war only makes them worse; and that he had told Braden many times how he felt about this and that it was good that he felt such responsibility to his fellow man (Pet. App. 24a; G.A. 20-21).

Robert Mulloy, petitioner's brother, wrote to the board that while he disagreed with petitioner's unwillingness to bear arms he believed petitioner was sincere in his feelings, and said that petitioner had maintained this position for a number of years (G.A. 25).

In his letter transmitting the completed Form 150 to the board, petitioner advised that he had been informed by his attorney that he was "still under bond to the Federal Court in Lexington" and he re-

quested "a personal interview * * * to discuss my appalachian [*sic*]" (G.A. 24). The board replied that while petitioner's appeal rights and the time within which to seek a personal appearance as of right had both lapsed, it was granting him a personal appearance as a matter of "courtesy" (G.A. 23).[2]

On November 9, 1967, petitioner appeared before the board for the courtesy interview and the board received and placed in his file the several letters submitted in support of his request for conscientious objector status. During the interview, which lasted ten or 15 minutes, petitioner was given full freedom to express himself as to why he thought he should not be drafted (Pet. App. 45a; A. 42a, 44a; Tr. 162-163). His principal statement, according to the recollection of the chairman, J. Allen Sherman, "was in relation to his work and the importance of his work in the mountains of Eastern Kentucky" (A. 42a). He presented, Sherman recalled, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration" (A. 44a-45a). Board member Wolking's "only recollection" of petitioner's remarks was, similarly, that he

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[2] Although petitioner's time within which to request a personal appearance as of right, under 32 C.F.R. 1624.1(a), had expired, authority for the granting of a "courtesy" appearance is to be found, as the court of appeals noted (Pet. App. 3a-4a), in 32 C.F.R. 1625.1(c), under which local boards are directed to "keep informed of the status of classified registrants" and are authorized to question registrants and take "other steps" to that end.

"felt like his work in Appalachia was very important and was at least important to him and he felt like he should be made a Conscientious Objector or should have Conscientious Objector status because of that * * *" (A. 61a).[3] At the conclusion of petitioner's statement the chairman asked him if there was anything additional he cared to say and, when petitioner indicated there was not, the interview terminated (A. 42a; Tr. 156-157, 162-163). A résumé of petitioner's statements, prepared by the clerk and placed in his file, states that petitioner "advised that he

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[3] Petitioner testified that the atmosphere at the interview was polite but tense; that there were "hard stares" from the members and he was asked "belligerent" questions; that among the questions were whether he was not claiming to be a conscientious objector "just * * * to get out of the draft" and whether he felt any obligation to serve his country; that he answered "no" to the first question and, to the second, that he felt he was already serving his country in the work he was doing in Eastern Kentucky. He testified that after he had explained the development of his conscientious objector beliefs he was asked if he felt that his work was important; that he answered that he did think so; and that, in reply to an inquiry by a member as to whether he could be replaced, he said that that would be difficult due to the nature of his work (A. 69a-71a).

Chairman Sherman testified that few if any questions were asked at the interview; that he did not recall what the questions were; but that he was sure petitioner was not asked if he had filed the C.O. claim just to get out of the draft or if he felt any obligation to serve his country (A. 42a-43a; Tr. 178). Member Downes did not recall either of those questions being asked, did not remember asking any questions himself, and had the impression that petitioner "did all of the talking" (A. 56a; Tr. 99-100). Member Wolking, the only other member present (A. 66a), did not remember asking any questions himself and had no recollection of any other member doing so (A. 60a-61a).

was claiming a C.O. classification because he had learned through experience and did not until later in life realize the importance of now believing as he did" and that he "felt that military service would interrupt his work and there would be no one else to take his place" (G.A. 28). The résumé further indicates that petitioner advised the board that he was under bond to the federal court as long as the time for appeal in the case arising out of the sedition charge was running; that the clerk was instructed to write to the federal court to inquire concerning the appeal and the bond; and that until such time as a reply was received the board "would not consider him as a C.O." (G.A. 28-29). The minute entry in petitioner's file reflecting the action taken on November 9 states that "classification was not re-opened" (Pet. App. 20a).

On November 12, 1967, petitioner wrote to the board (Pet. App. 32a-34a):

> I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.
>
> * * * * *
>
> This brings us to the war in Vietnam and my draft situation.. I do not question individual integrety [*sic*] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.
>
> I told you I felt that I was serving my country's needs here in Pike County. That was no

frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think.

* * * * *

On December 2, 1967, petitioner advised the board that he had been "fired" by Appalachian Volunteers for claiming conscientious objector status and for stating that he would refuse induction if ordered. He said that he felt bad about being fired, but that a person must have the "conviction of his beliefs," and he asked the board to consider his loss of employment as a public demonstration of his C.O. convictions (G.A. 29).

On December 6, 1967, a letter (written several weeks previously) from the clerk of the federal court to the Kentucky State Selective Service Headquarters advising that petitioner had recently been a plaintiff in a civil action in the court but that the clerk had

no information of his ever having been a defendant in a matter in that court, civil or criminal, was received by the local board (G.A. 30). On January 3, 1968, petitioner advised the local board that the sedition charge against him had been dropped and the bond released (G.A. 31).

On January 11, 1968, the local board, after considering "[a]ll information in file * * * including claim of Conscientious Objector," voted 4-0 not to reopen petitioner's classification. "All Members present," according to the minute entry, "felt this information did not warrant re-opening" of the I-A classification (Pet. App. 20a). On January 21, 1968, following notification of the board's action, petitioner wrote to the board: "I appeal your failure to reclassify me I-O. I consider the interview in November a re-opening of my case" (A. 30a-31a). On January 23, 1968, the board replied that the personal appearance it had granted petitioner had been merely a matter of "courtesy", since his time for a personal appearance as of right had expired, and that the board did not consider the interview a reopening (A. 32a). On the same day, petitioner was ordered to report for induction on February 23, 1968. Petitioner reported as directed, but refused to submit to induction (Pet. App. 20a).

At trial petitioner called all of the members of the local board and questioned them as to the basis of the board's decision not to reopen his classification (Pet. App. 39a-40a, 42a-54a; A. 41a-49a, 52a-68a, 74a-78a). Chairman Sherman testified in relevant part (Pet. App. 39a-40a):

> Taking everything that he—he did not make out—his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.
>
> Now, I went over his 150 Form. What's in it, now, I couldn't tell you. * * * His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.
>
> * * * * * *
>
> The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished us, the letters he had sent us with his 150 form and the information that he had given when he appeared in person.

Member Wolking testified that the board had assumed that petitioner was sincere, but that nonetheless the evidence was insufficient to justify giving him C.O. status, since his claim was grounded essentially on his work in Eastern Kentucky (A. 62a-63a; Pet. App. 49a, 50a-51a). The other board members, Downes and Rickert, were not questioned as to whether they regarded or assumed all of petitioner's statements to the board to be true, or his claim a sincere one, and they gave no testimony pertinent to those points. All of the members testified that they felt they had given full, fair, and unbiased consideration to petitioner's case (Tr. 110, 115-116, 128-129, 132-133, 144-145, 178).

ARGUMENT

1. Petitioner contends that the new information which he presented to the local board with his request to reopen his classification (the representations made in the Form 150 and in the accompanying letters) constituted a *prima facie* showing that he was entitled to conscientious objector status; that the board was consequently required to reopen his classification, evaluate the new information, and reclassify him (to I-O or again in I-A); and that, by refusing to reopen, the board improperly precluded him from taking an administrative appeal from its refusal to grant him the classification sought (Pet. 9-21).[4] He relies on the principle of such cases as *United States* v. *Freeman*, 388 F. 2d 246 (C.A. 7), *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), and *Davis* v. *United States*, 410 F. 2d 89 (C.A. 8), that a request to reopen can properly be denied only where the new information relied on is insufficient on its face to justify a change of classification, and that a board may not, under the guise of refusing to reopen, evaluatively weigh the new information "against

[4] Under the regulations, if the board reopens it must again classify the registrant "in the same manner as if he had never before been classified" and the registrant has the same right to appear personally before the board or to take an administrative appeal, or both, as in the case of an original classification, even though he is again placed in the category he was in before the reopening (32 C.F.R. 1625.11, 1625.13). If the board declines to reopen, it simply advises the registrant by letter that the submitted information does not warrant reopening (32 C.F.R. 1625.4), and there is no right of personal appearance or of appeal.

other elements in the situation" and on the basis of that appraisal determine that it is not entitled to "credence as fact" (*Miller*, *supra*, 388 F. 2d at 975).

We assume, *arguendo*, that despite the rather vague character of the asserted religious basis of his claimed conscientious objection to participation in war in any form, the new information which petitioner presented in the representations made in the Form 150 and the accompanying letters (*supra*, pp. 7-11) did present a *prima facie* showing that he met the statutory conscientious objector standard (50 U.S.C. App. (Supp. IV) 456(j)). We submit, nevertheless, that the board was not bound to reopen his classification automatically on the basis of that showing, and that, in the particular circumstances of this case, the board was warranted in declining to do so.

32 C.F.R. 1625.2 provides that the local board "may" reopen a registrant's classification, upon his written request, if the request "is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification * * *." Thus, as the court of appeals noted (Pet. App. 6a), the regulation gives *discretion* to the local board to reopen in the circumstances stated—it does not require that it do so.[5] This discretion, like any legally conferred discretion, may of course not be arbitrarily exercised. Cf. *Townsend* v. *Zimmerman*,

[5] If the board is of the opinion that the newly alleged facts, if true, would *not* justify a change of classification (or that no new facts are presented), the board is *prohibited* from reopening (32 C.F.R. 1625.4).

237 F. 2d 376, 377 (C.A. 6); *United States* v. *Vincelli*, 215 F. 2d 210, 212-213 (C.A. 2); *United States* v. *Bartelt*, 200 F. 2d 385, 389 (C.A. 7); *Smith* v. *United States*, 157 F. 2d 176, 181 (C.A. 4), certiorari denied, 329 U.S. 776. But it is important to stress that it is authority that the regulation confers; it does not impose a command, even where a *prima facie* case for reclassification is made out.

Where a request to reopen is accompanied by allegations of new facts which, if true, would justify a change of classification, *and the board has no reason to question the truth or sincerity of the representations*, reopening concededly is required. Refusal to reopen would be unreasonable in those circumstances and hence an abuse of discretion. That was the situation in a number of the cases cited by petitioner. *E.g.*, *Howze* v. *United States*, 409 F. 2d 27 (C.A. 9); *Petrie* v. *United States*, 407 F. 2d 267 (C.A. 9); *Robertson* v. *United States*, 404 F. 2d 1141 (C.A. 5). But where, as in this case, the board has grounds for questioning the truth or sincerity of the allegations relied on, the board need not automatically reopen. Acting under the investigative powers granted by 32 C.F.R. 1625.1(c), the board, as the court below properly noted (Pet. App. 7a), can scrutinize the representations and inquire further—as part of the process of determining whether, in the exercise of its discretionary authority, reopening would be appropriate.

That is what the board did here. It granted petitioner a courtesy interview so that it could hear from him personally concerning the depth of his claimed

C.O. convictions. At the interview petitioner's principal statement, according to the recollection of the chairman, concerned the importance of his work in Appalachia. He presented, the chairman said, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration" (*supra*, p. 11). Similarly, Board member Wolking's only recollection of petitioner's remarks was that he "felt like his work in Appalachia was very important" and that he "should have Conscientious Objector status because of that * * *" (*supra*, p. 12). The clerk's résumé of the interview similarly states that petitioner "felt that military service would interrupt his work and there would be no one else to take his place" (*supra*, p. 13). A few days later, in his letter of November 12, 1967, petitioner advised the board that he had not yet "made up [his] mind" whether he would "go into the Army" in the event the board rejected his claim; that if he decided to go in he would do what he could to teach his fellow soldiers the truth about Vietnam and the principles of non-violence; and that if he decided not to do so he would resist induction and make as big a stink about the matter as possible (*supra*, pp. 13-14).

Against this background, the board could not only legitimately wonder whether these were the remarks, and this was the attitude, of an actual conscientious objector; it could also properly evaluate the allegations made in the Form 150 in the light of those substantially contemporaneous statements of petitioner himself, and conclude that no *prima facie* case,

within the meaning of the pertinent decisional law, had been presented. In determining whether a *prima facie* basis for reopening had been made, the board could, in other words, properly discount petitioner's previous written representations by his substantially contemporaneous statements made at the interview and in the subsequent November 12 letter. At least to the extent that the board's refusal to reopen was based on the foregoing considerations—and the record, it is submitted, fairly reflects that they were important if not indeed the decisive bases of the board's action—the board did not engage in an evaluative weighing of an otherwise sufficient *prima facie* showing within the meaning of the decisions relied on by petitioner.[6] What the board essentially did was to determine that the representations of the Form 150 and its accompaniments, viewed in the light of the contemporaneous statements, did not amount to such a *prima facie* showing as would justify reopening.

Petitioner argues, however, that the board "accepted everything [he] said as true and assumed that he was sincere in his beliefs" (Pet. 11-12, 13, 21, 26). The record, we submit, will not bear that interpretation. The testimony on which petitioner relies has been referred to previously (*supra*, pp. 15-16).

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[6] For example, in *Miller* v. *United States*, *supra*, the board weighed the registrant's conscientious objector claim against the fact that he had in the past sought to enlist in a reserve program. Finding the actions inconsistent, the board concluded that the claim was insincere (388 F. 2d at 975). It was *that* sort of evaluative weighing without reopening that the court in that case found improper.

To be noted, in the first place, is that only two members of the board—Chairman Sherman and Member Wolking—were questioned on the point in issue. The other members—Downes and Rickert—said nothing germane. When the statement of the chairman is carefully examined, it appears that all he relevantly meant to say was that "assuming everything that [petitioner] said down there at that time [*i.e., at the interview*] to be so, he still did not make out a case for a conscientious objection"—because "his claim [at the interview] was principally on his job, the work he was doing * * *." Nothing in the chairman's testimony can be read as meaning that he accepted the sincerity of *everything* that petitioner said—including the representations in the Form 150. Member Wolking's testimony is at best ambiguous. In its context, we believe that his statement, "We assumed he was sincere, that's right," was meant to convey no more than that the members assumed petitioner was sincere in his remarks at the interview about "the importance of his work in Appalachia" (Pet. App. 49a). The assumption that these two members meant to say that they assumed petitioner was sincere in his *representations that he was a conscientious objector* is simply not reconcilable with their testimony as a whole (see *supra*, pp. 11-12). Moreover, if they assumed petitioner was sincere in his claim to be a conscientious objector, it would have been entirely inconsistent, and indeed inexplicable, for them to vote not to reopen.[1]

---

[1] Petitioner, noting the court of appeals' comment that his November 12 letter (erroneously referred to as his letter of

2. There is no merit to petitioner's contention that since a registrant whose claim to conscientious objector status is denied at the time of his original classification is entitled under the regulations to appeal administratively from the denial as of right, and since a registrant whose C.O. claim is denied following reopening and reconsideration of his classification can similarly appeal from the board's decision of the claim on its merits (see note 4, *supra*), it is discriminatory and a denial of due process to

---

November 17) "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief" (Pet. App. 8a), argues that the court erroneously failed to recognize that if a registrant's objection to participation in war is based partly on religious training and belief and partly on other factors he is nevertheless entitled to C.O. status (Pet. 22-26). We do not dispute the proposition that a conscientious objection to war that proceeds partly on religious and partly on non-religious grounds meets the statutory test. The point, however, is inapposite. *The board* here did not reject petitioner's claim because it concluded that it was based on non-religious as well as religious considerations. The evident basis on which it rejected the claim was that, as appears from the earlier discussion and as the court of appeals' opinion generally indicates, it concluded that on the basis of petitioner's own *prima facie* showing the claim was not sincerely and genuinely entertained. For the same reason, the question whether Congress can constitutionally limit the conscientious objector exemption to those whose opposition to participation in war is based upon religious training and belief (Pet. 26-28) is not presented on the instant record. There is therefore no occasion for the Court to defer action on the present petition until after it decides *United States* v. *Sisson*, pending on direct appeal, No. 305, this Term, and *Welsh* v. *United States*, No. 76, this Term, in which certiorari was granted on October 13, 1969.

refuse the right of appeal to one who, like petitioner, is denied reopening because he has failed to present a *prima facie* case of entitlement to that status (Pet. 28-31). It is not unreasonable to require that a registrant who first advances a claim to conscientious objector status after he is originally classified make a *prima facie* showing that he is entitled to that classification before the right of administrative appeal, with its attendant delays, should accrue. *Klubnikin* v. *United States*, 227 F. 2d 87, 90-91 (C.A. 9), certiorari denied, 350 U.S. 975; *Boyd* v. *United States*, 269 F. 2d 607, 611 (C.A. 9). Nothing in *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), relied on by petitioner, is to the contrary. All that *Miller* relevantly held was that it would be impermissibly discriminatory for the regulations to be read as permitting a board to distinguish—in deciding whether to grant reopening, with its attendant right to appeal—between "prima facie situations of legal equality" (388 F. 2d at 976-977).

3. Nor is there merit to petitioner's claim that the board failed to consider his request for conscientious objector status fully, fairly, and competently (Pet. 31-35). Particularly since his appearance before the board was a "courtesy" interview only, *i.e.*, one that need not have been granted at all, it is immaterial that one of the four members did not attend it. And it is not relevant that the interview lasted only ten or 15 minutes. As noted previously, petitioner was given complete freedom to say all that he wished at the interview. While Member Downes only

"scanned" petitioner's Selective Service file prior to the interview and did not remember whether he read the completed Form 150 at that time (Pet. App. 43a), he recalled reading it at or prior to the meeting of January 11, 1968, at which the vote on reopening was taken (Tr. 108-109). Downes' acknowledgment that the only occasion he would have had to consider the file would have been during or prior to a board meeting and that he never took the file home to "study it" (Pet. App. 47a) does not indicate that the unpaid board member's consideration of petitioner's case was superficial or constitutionally inadequate. That some of the members' answers to defense counsel's inquiries testing their knowledge of the law and the regulations reflected occasional misunderstandings likewise does not show that their handling of petitioner's case failed to meet due process standards. As noted previously, all of the members testified that they felt they had given the case full, fair, and unbiased consideration.[8]

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[8] In addition to the contentions urged in the present petition, petitioner seeks to join in the petition for a writ of certiorari in *Pratt* v. *United States*, No. 666, this Term (see p. 1 of the latter petition). Our response to the contentions which petitioner thus seeks to adopt by reference is contained in our separate brief in opposition filed in that case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 369246 339

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SUPREME COURT OF THE UNITED STATES

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October Term, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 655

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-against-

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REPLY TO BRIEF IN OPPOSITION

QUESTION PRESENTED

I. Whether the decision of the United States Court of Appeals for the Sixth Circuit, that in the circumstances of this case the petitioner's selective service local board neither abused its discretion refusing to reopen the petitioner's classification, nor reopened such classification in fact, is in conflict with the decisions of other Courts of Appeal on the same question?

2. Whether the present petition for certiorari raises the same issue raised in *United States v. Sisson*, and *Welsh v. United States*, which are currently before this Court?

3. Whether certiorari should be granted to prevent a gross miscarriage of justice and the violation of the Congressional policy of affording meticulous procedural protections to registrants, like the presnet petitioner, who claim to be conscientious objectors.

ARGUMENT

1. An important consideration governing the granting of review on certiorari is whether a Court of Appeals has rendered a decision that is in conflict with the decision of another Court of Appeals on the same matter. The petitioner has contended that the decision of United States Court of Appeals for the Sixth Circuit in the case at bar on the question of when a board abuses its discretion in refusing to reopen and when it has reopened in fact, is in conflict with the decisions of all other Courts of Appeal that have passed on the question. He further contends that, again in conflict with the decisions of other Courts of Appeal on the same question, the Sixth Circuit has applied the "basis in fact" test applicable to judical review of a board's final determination to the review of the board's determination that a registrant failed to make out a *prima facie* case for reopening, and in so doing, allows a board to engage in evaluative consideration of all the information in a registrant's file under the guise of determining whether the new information submitted by the registrant, if true, would entitle him to the claimed classification.

The United States does not meet the substance of the petitioner's contention with respect to the conflict among the Courts of Appeal. It ignores the basis of the decision of the Sixth Circuit in the case at bar. It likewise ignores the interpretation that Court put on a board's power under 32 C.F.R. Section 1625.2, 1625.4, and on the scope of review of

the board's action by the Court. Instead, it tries to justify the action of the local board on a totally different ground, and says that, therefore, the Court of Appeals was correct in holding that, in the circumstances of this case, the board did not abuse its discretion in refusing to reopen. In so doing, it introduces a *third test* for interpreting the board's power under 32 C.F.R. Section 1625.2 1625.4 If the administration of the draft law is to have some minimum of uniformity, this Court should grant certiorari to determine once and for all when a board is required to reopen a registrant's classification under 32 C.F.R. Section 1625.2, when it may refuse to reopen under 32 C.F.R. Section 1625.4, when it has in fact reopened by engaging in evaluative consideration, and what is the role of the Courts in reviewing a board's decision to refuse to reopen.

The Court of Appeals explicitly stated why the board did not abuse its discretion in denying the petitioner's request to reopen:

> "In our judgment, he did not make out a *prima facie* case of conscientious objection, and the additional information that he supplied did not justify a change in his classification." 414 F.2d at 426.

It accepted the statement of the Chairman that "Mulloy's claim for deferment was based principally upon his job," and observed that "Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views rather than on religious training and belief." 412 F.2d at 425. It explicitly held that the board could consider all the evidence in his file and his statements at the interview in determing whether or not he had made out a *prima facie* case. According to the Court this consideration justified the conclusion that he was seeking an occupational deferment, and/or that his objection to military service was not based upon religious training and belief.

It is the submission of the petitioner that this is the clearest example of evaluative consideration under the guise of determining whether the registrant has made out a *prima facie* case. Both in result and rationale it is directly in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967), and the decision of the Court of Appeals for the Fifth Circuit in *Robertson v. United States*, 404 F.2d 1141 (5th Cir., 1968). The United States does not dispute the general proposition that a board may not under the guise of refusing to reopen evaluatively weigh the new information. (Brief of the United States, pp. 17-18). It grudgingly assumes, *arguendo*, that the petitioner's responses to the questions contained in SSS Form 150 and the accompanying letters did present a *prima facie* case for classification as a conscientious objector. (Brief of the United States, p. 18), and admits the correctness of cases such as *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967), *Davis v. United States*, 410 F.2d 89 (8th Cir., 1969), and *Howze v. United States*, 409 F.2d 27 (9th Cir., 1969), holding that when such information does prevent a *prima facie* case, the board must reopen. And it does not even comment on the petitioner's argument that the Sixth Circuit's standard of review of a board's refusal to reopen a classification is the same test that is applied to review of a board's final determination, which is directly in conflict with the decisions of other courts of Appeal on this question. (Petition for Certiorari, pp 17-20).

It then goes on, however, to introduce a new test to determine whether the board must reopen the classification under 32 C.F.R. Section 1625.2. Even though a *prima facie* case is presented on the basis of the SSS Form 150 and the supporting letters, the board can still refuse to reopen, according to the United States, "where, as in this case, the board has grounds for questioning the truth or sincerity of the allegations relied on." (Brief of the United States, p. 19). In such a case the board "can scrutinize the representations and inquire further - as part of the process of determing whether, in

the exercise of its discretionary authority, reopening would be appropriate." *(Ibid.)* It then concludes:

> "In determining whether a *prima facie* basis for reopening had been made, the board could, in other words, properly discount petitioner's previous written representations by his substantially contemporaneous statements made at the interview and in the subsequent November 12 letter. At least to the extent that the board's refusal to reopen was based on the foregoing considerations - and the record, it is submitted, fairly reflects that they were important if not indeed the decisive bases of the board's action - the board did not engage in an evaluative weighing of an otherwise sufficient *prima facie* showing within the meaning of the decisions relied on by petitioner. What the board essentially did was to determine that the representations of the Form 150 and its accompaniments, viewed in the light of the contemporaneous statements, did not amount to such a *prima facie* showing as would justify reopening." (Brief of the United States, 21).

The above, it is submitted, is circular and internally inconsistent. The United States is apparently trying to say that there are two kinds of *prima facie* showings a registrant can make - that which is sufficient to require a reopening and that which is not - but it never says how they differ. Then it says that the board can "properly evaluate" the statements in the 150 Form and the supporting letters against "substantially contemperaneous statements of petitioner himself, and conclude that no *prima facie* case has been presented." (Brief of the United States, pp. 20-21). But, says the United States, this does not constitute an evaluative weighing. If it is not an evaluative weighing, then, it may be asked, what is it? The United States suggests in its discussion of *Miller v. United States, supra,* (Brief of the United States, p. 21, n. 6), that there the board weighed *inconsistent actions,* namely the registrant's claim of conscientious objector status against the

fact that he had sought to enlist in a reserve program. This, it admits, constitutes impermissible evaluative weighing and a reopening in fact. But in the case at bar the United States contends that the weighing was only of *inconsistent statements.* The board, it says, weighed the petitioner's statements in his SSS Form 150 and the statements in the supporting letters against his statement during the brief interview and concluded that he did not make out a *prima facie* case for classification as a conscientious objection. The fact that the same mental processes are involved in these two kinds of evaluation and the fact that the board is deciding in both cases that the registrant is not really a conscientious objector make no difference, according to the government, because while it is impermissible to weigh *inconsistent actions,* it is perfectly permissible to weigh *inconsistent statements.* Of course, the Court in *Miller* and in the other cases relied on by the petitioner drew no such distinction, and it is patently absurd. Evaluative consideration is a weighing of *facts,* whether reflected in action or reflected in statements, and this kind of evaluative consideration was engaged in here just as it was in *Miller* and the other cases. In all of these cases the board found that the claim was not "genuine." The only difference is that the Sixth Circuit upheld this type of evaluative consideration and the other Courts found it to be improper.

Nor does the United States ever indicate *what else the board would have done or what else it could have considered if it had in fact reopened the classification.* The approach of the United States, as well as the approach of the Sixth Circuit, would completely obliterate any distinction between a refusal to reopen on the ground that the registrant has failed to present a *prima facie* case and a denial of the claimed classification on the merits following a reopening. If the board has grounds for questioning the truth or sincerity of the allegations made by the registrant, *this is the clearest case requiring a reopening.* Only by such a reopening can the

factual questions - be resolved. The United States is saying just the opposite. It is saying that the refusal to reopen despite a case of *prima facie* sufficiency was justified precisely because the board could have found, in view of the other statements that the petitioner made, that he was not sincere, that he was lying when he completed the SSS Form 150, and that the persons writing the supporting letters were lying or mistaken. Certainly the board is entitled to make such a finding, but it cannot do so under the guise of finding that the petitioner did not make out a *prima facie* case. This is a decision on the merits, entitling him to an administrative appeal, and as even the United States admits, the board does not have the discretion to decide the merits under the guise of refusing to reopen.

More significantly, the premise on which the United States is proceeding, that the board was justified in refusing to reopen because it had grounds for questioning the petitioner's truth or sincerity, is totally unsound. *This is simply not what happened.* Nowhere in its Brief does the United States suggest precisely what the petitioner said that would have given the board causes to disbelieve his sincerity. It refers to the fact that he wanted to continue his work with the poor in Appalachia, and that if denied the classification, he would either submit to induction and teach his fellow soldiers "the truth about Vietnam and the principles of non-violence" or would resist induction There is nothing in either of these facts that is inconsistent with the claim of conscientious objection. Quite to the contrary they further attest to the petitioner's sincerity and the tenaciousness of his beliefs. In his answers to the SSS Form 150 the petitioner described at length his work among the poor, and related this work to his religious beliefs, which formed the basis of his conscientious objection to participation in war. (Pet. App. 28a). It was these beliefs which caused him to forego participation in the "affluent society" and work among the poor, and no rational person could say that because he

wanted to work among the poor, he could not at the same time be conscientiously opposed to participation in war. The fact that he would yield to superior force and suffer induction if his claim was denied could not mean that he held his beliefs any less strongly. In fact he did not yield and now face a sentence of five years' imprisonment and a fine of $10,000.

In any event, this argument ignores the simple fact *that there is nothing in the record to show that any board member ever raised a question concerning his sincerity.* The United States tries to argue that when the board members said they "assumed he was sincere," they did not mean that he was sincere about his representations that he was a conscientious objector. Moreover, says the United States, only two members testified on this point, and the others may have felt differently (since the government at the trial did not question the petitioner's sincerity either, the failure to obtain this admission form the other board members should be understandable). It would seem that since the argument of the United States is premised on the fact that the board members believed him to be insincere, it should come up with at least a shred of evidence to that effect. It cannot do so, because the government's position heretofore has been that, assuming the petitioner to be sincere, the board was justified in refusing to reopen on the ground that the petitioner had failed to make out a *prima facie* case. The following dialogue between the government's attorney, Mr Huddleston and board member Wolking, demonstrates this most clearly:

> Q. As I understand it then, you did not inquire into his sincerity, but the prima facie case that he presented?
> A. That is quite true.
> Q. Assuming that he was sincere?
> A. We assumed he was sincere, that's right. (Pet. App. 49a).

Board member Wolking, following the lead of the government's attorney and presumably speaking for the board collectively, said that the board never inquired into the petitioner's sincerity. Now the United States is saying that the board was justified in refusing to reopen, because it had grounds for questioning the truth or sincerity of the petitioner's allegations. The board did not think it had those grounds, or at least, if it did, no one ever said so, and this had nothing to do with its decision. As Mr. Woking again stated this time, on cross-examination:

> Q....in other words, you did not question his sincerity, I take it?
> A. That is correct.
> Q. You believed his sincerity - you believed that everything he said, even if true, would not entitle him to be a conscientious objector?
>
> A. Everything that was in the record and what he said. (Pet. App 51a).

The United States has not referred to a single place in the record where any board member suggested that the board believed the petitioner not to be sincere in his beliefs and in all his representations to the board written and oral.

Finally, says the United States, the board must have assumed the petitioner to be insincere, because, "if they assumed petitioner was sincere in his claim to be a conscientious objector, it would have been entirely inconsistent, and indeed

inexplicable, for them to vote not to reopen." (Brief of the United States, p 222). *This is the point the petitioner has been trying to make all along.* Since the board members assumed that he was sincere, and since as even the United States is willing to admit *arguendo*, he made out a *prima facie* case on the base of his SSS From 150 and the supporting letters, the board should have reopened. They refused to do so only because they denied his claim on the merits, and therefore he was entitled to an administrative appeal. Perhaps the reason they refused to reopen was, as the petitioner contends, that "they had little or no understanding of the applicable law" and "clearly demonstrated administrative incompetence." (Petition for Certiorari, pp. 33-35). The United States says that all the examination of the board members on the applicable law showed was "occasional misunderstandings," It is submitted that the examination showed not "occasional misunderstandings," but no understanding at all. It may also have been significant, as the Clerk testified, that in the seventeen years she had been with the board, *no registrant had ever been assigned to civilian work as a conscientious objector.* (Pet. App. 42a). For whatever reason, it *is* inexplicable that the board voted not to reopen, and this is why the petitioner is saying that he should not have to go to prison for five years.

2. The United States argues that the board did not reject petitioner's claim on the grounds that it was based on non-religious beliefs, but instead rejected it on the grounds that, "as the court of appeals' opinion generally indicates, it concluded that on the basis of petitioner's own *prima facie* showing the claim was not sincerely and genuinely entertained." (Brief of the United States,pp. 22-23, n. 7). As stated previously, this was not the reason given by the board not the reason given by the Court of Appeals in upholding the board's action. In supporting the decision of the board, the Court gave great weight to the letter sent by the petitioner on November 12, 1967, and stated, that the letter "indicated rather clearly that his opposition to serving in the Armed Forces was based on

essentially political, sociological or philosphical views and his conscience rather than on religious training and belief." 412 F.2d at 425. When the case was before the Sixth Circuit, the United States itself argued that, "Therefore, it is submitted that the basic requirement, 'By reason of religious training and belief,' is missing and completely void in the information supplied in support of the registrant's claim of conscinetious objection and request for a I-0 classification." (Brief of United States in *U.S. v. Mulloy*, p. 20). It concluded that:

> "It is submitted that the Court may properly determine that the registrant did not make out a *prima facie* case of conscientious objection to military service on the basis of religious training and belief, that the facts alleged by the appellant, even if true, would not have entitled him to the classification claimed, that in view of the appellant's occupational activities, his status with the law, and his willingness to fight for a cause in which *he* believed, the submission of a claim of conscientious objection was patently frivolous... *(id.* at p. 39).

The Court of Appelas was inpressed by the argument of the United States that the petitioner was not a "religious C.O." It is the requirement fo "religiosity" which is being challenged in *United States v. Sission*, No. 305, this Term, and *Welsh v. United States*, No. 76, this Term, and since the decision of the Court of Appeals proceeded on the assumption that the board could find that the petitioner was not a "religious C.O.," certitorari should be granted for this reason as well.

3. Throughout these proceedings the United States has been shifting its ground in an effort to uphold the action of Local Board 47 and to sustain the conviction of the petitioner. All the petitioner has sought from his local board was reopening of his classification so that his claim of conscientious objection could be considered, and if denied, the administrative appeal provided by the regulations. No classification of a registrant is permanent. 32 F.F.R. Section 1625.1(a). All that is necessary

to authorize the board to reopen is that the registrant make a request "accompanied by written information presenting facts not considered when the registrant was classified, which, if true would justify a change in the registrant's classification." 32 C.F.R. Section 1625.2. Reopening would seem to be particularly important in the case of a claim for classification as a conscientious objector in view of the strong Congressional policy to afford "meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferment in appropriate cases." *United States v. Gearey*, 368 F.2d 145, 150 (2d Cir., 1966).

The petitioner sumbitted his request for classification as a conscientious objector to his local board as soon as it had matured. He completed the SSS Form 150 in detail and accompanied his request by supporting letters. The board members looked at his file, if at all, only at the time of his "courtesy interview," and did not give it careful consideration. This board had never, in the memory of the Clerk, granted classification as a conscientious objector, and as the testimony of the members indicates, had little or no understanding of the applicable statute and regulations. The petitioner was told by the board that "there was nothing new" and that what he really wanted was an occupational deferment. The board said that it had not reopened the classification and denied petitioner an administrative appeal.

At the District Court level, the United States argued that the action of the board was justified, since even assuming the petitioner's sincerity (which it said the board did), he did not make out a *prima facie* case, because he really was seeking an occupational deferment rather than classification as a conscientious objector. On appeal, the United States added the argument that the petitioner's opposition to war was not based on religious training and belief. It now argues that the action of the board was justified, because although the petitioner may have made out a *prima facie* case of conscientious objection on the basis of religious training and belief, the board could find that he was not sincere, and, therefore, could refuse to reopen.

The arguments of the United States have come full circle. At first it was argued that since the board assumed the petitioner to be sincere, it did not in fact reopen the classification. Now it is argued that the board found that the petitioner was not sincere so that it was justified in refusing to reopen. Left unanswered is why the belated finding of insincerity did not constitute a reopening in fact.

The primary contention of the petitioner all along has been that the board either abused its discretion in refusing to reopen or that it reopened in fact. All the other Courts of Appeal that have passed on the question have held that the board may not engage in evaluative consideration of the claim on the merits under the guise of refusing to reopen. Now the United States is arguing that the petitioner's board did not engage in evaluative consideration when it found that despite the *prima facie* sufficiency of his SSS 150 Form and the supporting letters, the claim was not "sincerely and genuinely entertained." (Brief of the United States, pp. 22-23, n. 7). If this is not evaluative consideration, it may be asked what is. The petitioner's board, under the guise of refusing to reopen, has determined the merits of his claim and decided that he was not entitled to classification as a conscientious objector, but without affording him the administrative appeal to which he was entitled. This is contrary to what the regulations provide, and in no other reported case has a conviction been permitted to stand in such circumstances.

The petitioner faces the maximum sentence of five years' imprisonment and a fine of $10,000. It is unfair to allow this penalty to be imposed upon him so that the "legality" of the actions of Local Board No. 47 may be upheld. His case is indistinguishable from all the others where local board have made a merits determination under the guise of refusing to reopen the classification. The decision of the Court of Appeals in the case at bar sanctions such a practice in the Sixth Circuit, and certiorari should be granted to make it clear whether it was correct in so doing, and whether all the other Courts of Appeal are in error.

CONCLUSION

For the reasons aforesaid, and for the reasons set forth in the Petition for Certiorari, it is respectfully prayed that the writ be granted.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED
MAR 3 1970
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1969.

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (A. 3-13) is reported at 412 F.2d 421. A petition for rehearing was denied without opinion. Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 10, 1969. A petition for rehearing was denied on August 29, 1969. The petition for a writ of certiorari was filed on September 25, 1969, and was granted on January 19, 1970. The

jurisdiction of this Court rests on 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall pass no law respecting the establishment of religion or prohibiting the free exercise thereof;***"

Amendment V

"No person shall *** be deprived of life, liberty, or property, without due process of law***."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Military Selective Service Act of 1967, 50 App. U.S.C. Sections 451 et seq. The relevant provisions are 50 App. U.S.C. Sections 456 (j), 462 (a). The regulations involved are Selective Service Regulations, part 1625, 32 C.F.R. Ch. XVI. Because these provisions are lengthy, their pertinent text is set forth as Appendix A.

QUESTIONS PRESENTED.

1. Did the Court below err in holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification under 32 C.F.R. Section 1625.4, nor did it reopen his classification in fact within the meaning of 32 C.F.R. Section 1625.2, so as to entitle him to an administrative appeal as provided in 32 C.F.R. Section 1625.13? And in so holding, did it err further in that it permitted the board to engage in evaluative consideration of all the information in the petitioner's file under the guise of

determining whether the new information submitted by the petitioner, if true, would entitle him to classification as a conscientious objector?

2. Did the Court below err in its conclusion that the petitioner did not make out a prima facie case for classification as a conscientious objector, because his objection to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief?"

3. Does the fact that the petitioner was denied the opportunity for full review of his claim for classification as a conscientious objector, including review by an appeals board, when such claim was presented for the first time, constitute a violation of due process of law, as guaranteed by the Fifth Amendment?

4. Was the petitioner denied due process of law, as guaranteed by the Fifth Amendment, in that his claim for classification as a conscientious objector was not given full and fair consideration by his selective service local board, because the members of said board refused to give such consideration to his claim and/or because they lacked the competency and understanding of the applicable statute and regulations to pass intelligently on said claim?

STATEMENT OF THE CASE.

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 App. U.S.C. Section 462 (a). A sentence of five years' imprisonment and a fine of $10,000 were imposed. Petitioner had requested classification as a conscientious objector (Class 1-0), and the questions presented for review in this case arise out of the stated refusal of his selective service local board to

reopen his classification of 1-A and to consider on the merits his claim for classification in Class 1-0.

Prior to March 17, 1966, petitioner had been classified in Class 2-S (college student), and from that date until May 11, 1967, he was granted an occupational deferment to work with the Appalachian Volunteers, an anti-poverty organization working in Eastern Kentucky. On May 11, 1967 he was placed in Class 1-A, and he appealed from that classification. He was ordered to report for a physical examination on June 26, 1967, and was found to be physically acceptable. He was then ordered to report for induction on July 17, 1967. This order was cancelled, since his appeal had not yet been determined by the Appeals Board. On August 16, 1967, the Appeals Board classified him in Class 1-A by a vote of 5-0.

Petitioner and others had been engaged in organizing activities among the poor in Eastern Kentucky and in leading the opposition to strip mining that was taking place there. On August 11, 1967, petitioner and others were arrested in Pike County on a charge of "teaching sedition" and "advocating the overthrow of the government of Pike County." The arrest and threatened prosecution were found by a three-judge United States District Court to have been undertaken in part for the purpose of stopping organizing activities in Pike County. The Court also held that the statute in question, Kentucky Revised Statutes 432.040, was unconstitutional on its face and enjoined any prosecution under it. *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D.Ky. 1967). On September 5 1967, petitioner advised his local board that he was under bail to the federal court in connection with the above case (the right of the defendants in that action to appeal did not expire until November 17, 1967) and under bail to the Pike Circuit Court on a charge of flourishing a deadly weapon (that charge was subsequently dismissed). On September 21, 1967, the board issued an order

to report for induction which was cancelled on October 12, 1967.

Following his arrest and the proceedings in federal and state courts, the petitioner's beliefs as to conscientious objection to participation in war came to maturity, and on October 17, 1967, he wrote a letter to the board stating that "after much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form." (A. 41). He was then sent the Special Form for Conscientious Objectors (SSS Form 150), which he returned on October 26, 1967. He gave detailed answers to the questions on the form, stating among other things that he believed in a Supreme Being and that his religious training taught him that it was "against God's law to kill." He further stated that to be a member of the Armed Forces of any country would oblige him to kill or indirectly assist in killing. (A. 19). Various letters supporting his claim were sent to the board, including a letter from a Catholic priest. (A. 51).

At the time that he submitted the completed form, petitioner also requested in writing a personal appearance before the board. He was advised that although he was not entitled to an interview, the board would grant him a "courtesy interview." This interview took place on November 9, 1967, and lasted between ten and fifteen minutes. (A. 77). The Chairman of the board stated "at that time the Board came to the conclusion that there was no merit to his contention that he was entitled to conscientious objector status." An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened." (A. 14). The board, however, did not take a vote at the meeting of November 9th. On November 12, 1967, petitioner wrote a letter to the board setting forth his views more fully (A. 58). It was this letter which, according to

the Court of Appeals, "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F. 2d at 425

On January 11, 1968, the board formally considered petitioner's claim for classification, and by a vote of 4-0 took the following action as noted in the Classification Questionnaire: "All information in file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of 1A class." (A. 14). On January 21 petitioner wrote to the board, appealing from the board's failure to reclassify him in Class 1-0 stating that he considered his case to have been reopened. The board wrote in reply two days later that it did not consider his case to have been reopened and that he had no right to appeal. (A. 64, 65). On the same date he received an order to report for induction on February 23, 1968.

On February 8, 1968, appellant filed a civil action in the United States District Court for the Western District of Kentucky, seeking to enjoin his induction into the Armed Forces on the ground that the order to report for induction was void, as having been issued in violation of applicable Selective Service Regulations and in such circumstances as to violative of due process of law. On February 16, 1968, the Court dismissed his complaint and denied relief. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, together with a motion for an interlocutory injunction pending appeal. The latter motion was denied on February 22, 1968. On February 23, 1968, the petitioner refused to submit to induction into the Armed Forces. The appeal in the civil case was dismissed as moot by the Court of Appeals on May 2, 1968.

The petitioner was indicted by the grand jury on March 11, 1968. He was arraigned on March 18, 1968, at which time he pleaded not guilty and further moved that the indictment be dismissed on the ground, inter alia, that "The Order to Report for Induction, the refusal to obey which forms the basis of said indictment, is illegal, void and of no effect, because it was issued in violation of the applicable statutes and regulations, and further because it was issued in such circumstances so as to deprive the defendant of due process of law." It was stipulated by counsel for the petitioner and counsel for the government that the record of the proceedings in the petitioner's civil suit should form a part of the record in the criminal proceeding. On March 22, 1968, the District Court entered an order overruling the petitioner's motion. The Court also stated that it had read the selective service file of the petitioner and the transcript of the hearing in the civil suit, as a result of which it concluded that there was a reasonable basis in fact for the classification of the petitioner and that the actions of the board were proper in all respects.

The case was tried before a jury on April 5, 1968. At the conclusion of the government's case counsel for the petitioner moved for a judgment of acquittal, which was overruled. Counsel for the petitioner then presented his case and called as witnesses the four members of the petitioner's selective service local board. Following the examination of said witnesses, counsel moved for a judgment of acquittal on the ground that the testimony of board members showed conclusively that the petitioner had been denied a full and fair hearing and that the demonstrated incompetence of the members of the board in passing on the petitioner's claim for classification as a conscientious objector constituted a denial of due process. This motion was overruled. At the conclusion of the petitioner's case, the motion was renewed together with a written motion for

acquittal, filed by petitioner's counsel that day. All said motions were overruled. The jury returned a verdict of guilty, and sentence was imposed on April 8, 1968.

The petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT.

I. The Petitioner's Selective Service Local Board either abused its discretion in refusing to reopen his classification under 32 C.F.R. Section 1625.4, or it reopened his classification in fact within the meaning of 32 C.F.R. Section 1625.2. The petitioner made out a prima facie case for classification as a conscientious objector on the basis of the information supplied in his SSS Form 150 and the supporting letters. The board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. In such circumstances a reopening was clearly required.

The board concluded that the petitioner was not a "genuine conscientious objector," because what he really wanted was an occupational deferment to enable him to continue his work among the poor. The Court of Appeals also sustained the action of the board on the ground that the petitioner's opposition to war was "based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." Either conclusion could only be arrived at by evaluative consideration of all the information in the file and by determining the merits of the claim. Such evaluative consideration constitutes a reopening in fact, entitling the petitioner to an administrative appeal, which was denied to him by the board. The action of the Court of Appeals, if permitted to stand, completely obliterates any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial

of the classification on the merits after a reopening under Section 1625.2.

The Court of Appeals for the Sixth Circuit, unlike all other Courts of Appeal that have passed on the question, is applying the "basis in fact" test applicable to judicial review of a board's final determination on the merits to review of the board's determination that the registrant did not make out a prima facie case. This is clearly erroneous, since it means that the power of the courts to determine procedural fairness is no different from their power to determine the substantive validity of the classification. The Sixth Circuit also stands alone in holding that in determining whether the registrant has made out a prima facie case for reopening the board can consider and evaluate all the information in the registrant's file against the new evidence which he has submitted in support of his claim.

In the case at bar the line between a refusal to reopen on the ground that the registrant has failed to make out a prima facie case and a denial of the classification on the merits after a reopening has been totally destroyed. There is nothing more the board could have done and no further information it could have considered if it had in fact reopened the classification. The government's own arguments, which have shifted at every stage of the litigation, demonstrate the point conclusively.

II. In concluding that the petitioner's opposition to war was not based on religious training and belief, the Court of Appeals failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector. Nor is a manifestation of those beliefs by working with the poor inconsistent with a claim of conscientious objection. Certainly it does not justify the conclusion that he really wanted an occupational deferment rather than classification as a conscientious objector.

Alternatively, even if a registrant's opposition to war was not based upon religious training and belief, so long as the requisite objection to war exists, he may not constitutionally be denied classification as a conscientious objector.

III. If it is held that the board may engage in evaluative consideration of the petitioner's claim on the merits without thereby reopening his classification, the resultant denial of full review, including review by an appeals board, is discriminatory and violative of due process. If the board refuses to reopen, there is no appeal, notwithstanding that the claim was made for the first time. At the same time registrants whose claim was made at the time of their original classification or whose classification was reopened and their claim denied on the merits do have the right of appeal. All have presented their claims for the first time after the facts entitling them to such status have matured. To allow two of them to appeal while denying the right of appeal to the third constitutes impermissible discrimination between prima facie situations of legal equality "so unjustifiable as to be a denial of due process."

IV. The Petitioner was denied due process of law in that his claim for classification as a conscientious objector was not given full and fair consideration by his selective service local board. The members of the board only looked at his file, if at all, immediately prior to the "courtesy interview." The file was "scanned" at best, and no member carefully read in particular the detailed answers contained in his SSS Form 150, on which his claim of conscientious objection was based. Clearly this cannot constitute full and fair consideration of his claim, as is required by administrative due process.

The members of the petitioner's local board lacked a minimum understanding of the applicable statute and regulations and thus were unable to pass intelligently on his claim for classification as a conscientious objector. The Clerk testified that no registrant had ever been assigned to civilian work as a

conscientious objector in her seventeen years with the board, and there is doubt if the classification had ever been given. The answers of the board members to basic questions about conscientious objection clearly demonstrated "administrative incompetence," and to allow a board so constituted to pass on petitioner's request in itself amounts to a denial of due process of law.

ARGUMENT

I

The Court below Erred in Holding that the Petitioner's Selective Service Local Board Neither Abused Its Discretion in Refusing to Reopen His Classification under 32 C.F.R. Section 1625.4, Nor Did It Reopen His Classification in Fact Within the Meaning of 32 C.F.R. Section 1625.2. In So Holding It Erred Further in That It Permitted the Board to Engage in Evaluative Consideration of All the Information in His File under the Guise of Determining Whether the New Information Submitted, If True, Would Entitle Him to Classification as a Conscientious Objector.

Throughout these proceedings the essential contention of the petitioner has been that in the circumstances of this case either the board was required to reopen his classification and consider his claim of conscientious objection on the merits or that, in fact, the board did reopen his classification, rejecting the claim on the merits, but denying the petitioner the administrative appeal to which he was entitled under 32 C.F.R. Section 1625.13. The board took the position that the petitioner did not make out a prima facie case for classification as a conscientious objector, but, as the record clearly indicates, it reached that conclusion only by considering all the information in his file and evaluating the information favorable to the claim against the information that, in its opinion, did not support it.

The Court of Appeals agreed with that position, holding that the board was not required to reopen his classification because, based upon its consideration of all the information in his file, it could conclude that he had not made out a prima facie case. What the board did, and what the Court of Appeals permitted it to do, was to engage in an *evaluative consideration* of the petitioner's claim, so that it rejected the claim on the merits without giving petitioner the administrative appeal to which he was entitled under 32 C.F.R. Section 1625.13. The decision of the Court of Appeals, if allowed to stand, completely obliterates any distinction between a refusal to reopen under 32 C.F.R. 1625.4 and a denial of the classification on the merits after a reopening under 32 C.F.R. Section 1625.2. In effect, the board can deny a registrant's claim on the merits under the guise of finding that he did not make out a prima facie case, and the provisions of 32 C.F.R. Section 1625.13, authorizing an administrative appeal after a reopening and a denial on the merits, will become meaningless.

A. The Petitioner Made Out a Prima Facie Case for Classification As A Conscientious Objector.

The answers contained in petitioner's SSS Form 150 clearly make out a prima facie case of opposition to war on the basis of religious training and belief. The form is set out in full in the Appendix, pp. 15-23, but the following excerpts should indicate that the test of prima facie sufficiency was satisfied. The petitioner stated that he believed in a Supreme Being and that:

> "My religious training taught me that it is against God's law to kill. To be a member of the armed forces of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men."

* * * * * *

> "As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO." (A. 19,22).

The petitioner explained in detail his religious training and experience and stated that he was most influenced by Father Thomas Merton and by the teachings of Jesus Christ. (A. 22). The board was also in receipt of a letter from a Catholic priest supporting the petitioner's request and attesting to his sincerity. (A. 51).

The board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. (A. 71, 72, 84, 86). It is important to emphasize the board's acceptance of the petitioner's veracity and its assumption of his sincerity, because the government is now contending that the board was justified in refusing to reopen precisely because it had reason to question the truth or sincerity of the petitioner's representations. (Brief for the United States in Opposition to Certiorari, p. 19). That argument marks a significant departure from the government's position, which heretofore had been that *since the board assumed petitioner's sincerity and veracity, it did not, in fact, reopen his classification.* Be that as it may, the record clearly demonstrates that the board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. This is brought out in the following dialogue between the government's attorney at the trial, Mr. Huddleston, and board member Wolking:

> Q. As I understand it then, you did not inquire into his sincerity, but the prima facie case that he presented?
>
> A. That is quite true.
>
> Q. Assuming that he was since?
>
> A. *We* assumed he was sincere, that's right. (Emphasis added).
>
> (A. 84).

Board member Wolking, following the lead of the government's attorney and presumably speaking for the board collectively, said that the board never inquired into the petitioner's sincerity. It is true, as the government argues in its opposition brief, that only two members of the board, Mr. Wolking and Board Chairman Sherman, testified on this point. But as the above indicates, they were speaking for the board collectively, and since the government heretofore had been arguing that the board assumed the petitioner's sincerity and veracity, the failure to obtain this admission from the other board members (either by the government or by defense counsel) should be understandable. There is not a shred of evidence in the record indicating that any board member did not assume that the petitioner was truthful in his representations and sincere in his beliefs.

Despite the prima facie sufficiency of the statements contained in Petitioner's SSS Form 150 and in the supporting letters and despite the fact that the board members accepted everything that the petitioner said as true and assumed that he was sincere in his beliefs, it took the position that the petitioner "still did not make out a case for conscientious objection, and therefore, we saw no reason to reopen the case, because it wasn't there." (A. 71). This, in the view of the Court of Appeals, did not constitute an abuse of discretion. Its decision on this point is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967), and with the decision of the Court of Appeals for the Eighth Circuit in *Davis v. United States*, 410 F.2d 89 (8th Cir., 1969). In *Freeman*, the defendant gave rather sketchy answers to the questions contained in SSS Form 150. However, he did state that he believed in a Supreme Being, that he was a member of the Islam religion, and that by reason of his religious beliefs he was opposed to participation in

war in any form. There was nothing more, and according to Judge Koch, dissenting, "Most of this data comes from statements appearing in printed form which were adopted by the defendant by check mark or signature." 388 F.2d at 250. The Court held that what he had stated was sufficient to make out a prima facie case for classification as a conscientious objector, "since he presented new information in SSS Form 150 which, if true, entitled him to reclassification." The conviction, therefore, was reversed. In *Davis,* where the facts were very similar to the facts in the case at bar, the Court observed:

> "Davis' statements, taken from his Selective Service Form 150 . . . , if taken as true, demonstrate that he is conscientiously opposed to participation in war in any form and that his objection is based on religious training and belief. Accompanying his conscientious objector Form 150 was a letter from his pastor . . . These statements, if accepted at face value, constitute a prima facie case for the conscientious objector classification as specified in 50 U.S.C. App. Section 456(j). The local board was therefore required to reopen his classification. 32 C.F.R. Section 1625.2. . . ." 410. F.2d at 94-5.

If it was an abuse of discretion for the board to refuse to reopen in these cases, it was clearly an abuse of discretion for the board to refuse to reopen in the case at bar in view of the information that the present petitioner furnished in response to the questions contained in SSS Form 150 and in the supporting letters.

It is submitted that the approach taken by the other Courts of Appeal to the matter of making out a prima facie case for classification as a conscientious objector is clearly correct. The very nature of classification under the present Selective Service Act presupposes that changes will occur with some frequency. No classification of a registrant is permanent. 32 C.F.R. Section

1625.1(a). At any time the board may reopen and consider anew the classification of a registrant either upon his request or upon his own motion if it is in the possession of facts "not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." 32 C.F.R. Section 1625.2. The only time that the board is precluded from reopening the registrant's classification (other than after the issuance of a valid order to report for induction) is where the new facts, even if true, would not justify a change in the classification. 32 C.F.R. Section 1625.4. Whenever the classification is reopened it is if the registrant had never been classified before, 32 C.F.R. Section 1625.11, and following the reopening the registrant has the same right of personal appearance before the board and the same right of appeal as in the case of an original classification. 32 C.F.R. Section 1625.13.

The Court of Appeals took the position that the board has "discretion" under Section 1625.2 to determine whether or not it will reopen a classification, but that it is mandatory for the board to refuse to reopen under Section 1625.4 where the new facts, even if true, would not justify a change in the classification. 412 F.2d at 424. The government also argues Section 1625.2 does not "impose a command even where a prima facie case for reclassification is made out." (Brief for the United States in Opposition to Certiorari, p. 19). The other Courts of Appeal, however, have never recognized any authority in the board to refuse to reopen whenever a prima facie case has been made out. The clear import of Section 1625.2 and 1625.4, taken altogether, and read in the light of the other provisions of Part 1625 dealing with the procedure for reclassification, is that the board must reopen the classification whenever the new facts if true would justify a change in the classification. The only justification for refusing to reopen would be that contained in the regulations themselves, such as where the new facts, even if

true, would not entitle the registrant to the claimed classification, Section 1625.4, or where the new facts came to being after the issuance of a valid order to report for induction and were not due to circumstances beyond the registrant's control, Section 1625.2, and perhaps where the registrant has failed to reasonably inform the board of the new facts, as required by Section 1625.1 (b). See *Keene v. United States*, 266 F.2d 378 (10th Cir., 1959); *United States v. Beaver*, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963). But *c.f. McKart v. United States*, 395 U.S. 185 (1969). There is nothing in the regulations nor in the heretofore existing decisional law interpreting them to indicate that there is a hiatus in the provisions, so that the board may refuse to repoen even though a prima facie case has been established. Whenever the registrant has made out a prima facie case on the basis of the new facts presented, reopening is required, and the refusal to reopen is necessarily arbitrary and violative of the due process of law. *Stain v. United States*, 235 F.2d 339 (9th Cir., 1956); *United States v. Freeman, supra; Davis v. United States, supra.*

The present petitioner clearly made out a prima facie case for classification as a conscientious objector based on his answers to the questions contained in SSS Form 150 and the supporting letters. If the board had any doubts as to the truth of those statements or the sincerity of the petitioner's beliefs, the proper way to resolve those doubts was to reopen the classification and consider the request on the merits. In no way could it possibly be said that the "new facts, even if true, did not entitle petitioner to the claimed classification." The refusal to reopen in these circumstances constitutes a most flagrant abuse of discretion and cannot be permitted to stand.

B. The Board Engaged in Evaluative Consideration of the Claim on the Merits under the Guise of Determining that the Petitioner Did Not Make out a Prima Facie Case.

Even the government is willing to concede that the "new information which petitioner presented in the representations made in Form 150 and the accompanying letters did present a prima facie showing that he met the statutory conscientious objector standard." (Brief of the United States in Opposition to Certiorari, p. 18). This was *not* the view of the Court of Appeals, which explicitly stated why, in its opinion, the board did not abuse its discretion in denying petitioner's request to reopen:

> "In our judgment, he did not make out a *prima facie* case of conscientious objection, and the additional information that he supplied did not justify a change in his classification." 414 F.2d at 426.

The board took the position that the petitioner did not make out a prima facie case for classification as a conscientious objector because what he was really seeking was an occupational deferment. (A. 71, 74, 84). The Court of Appeals noted this fact and further observed that the petitioner's objection to serving in the Armed Forces was "based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." This fact was said to have been "rather clearly indicated" from the letter of November 12, 1967, which he sent to the board. 412 F.2d at 425.

However, it was never denied by the Court of Appeals that the petitioner presented at least some facts—at a minimum his answers to the SSS Form 150 and the supporting letters—which, if true, would have entitled him to be classified as a conscientious objector. The conclusion that the petitioner really wanted an occupational deferment or that his opposition to the war was not based on religious training and belief could be reached only

by the evaluation of all other information in his file. Such an evaluation constitutes a determination of the claim on the merits, a weighing of seemingly contradictory information and the drawing of inferences from such information. When a board has engaged in this kind of determination, it cannot be heard to say that "the new facts, if true, would not justify a change in the registrant's classification" within the meaning of 32 C.F.R. Section 1625.4. What the board has done is to conclude that the new facts, when considered in light of other facts and evaluated against those facts, would not justify a change in the registrant's classification. By so doing, it has reopened the classification, and the registrant is entitled to an administrative appeal, as provided in 32 C.F.R. Section 1625.13.

In the case at bar the Court of Appeals, held that the board *could* engage in such evaluative consideration, based upon all the information in the petitioner's file (as opposed to the new information submitted by the petitioner in support of his claim for reclassification), without thereby reopening the classification so as to entitle the registrant to an administrative appeal. That holding is directly in conflict with the holding of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). In that case the appellant had been classified I-A and had passed his pre-induction physical. Less than a month later he wrote a letter to the board claiming to have become a conscientious objector. He completed the SSS Form 150, and after an improper order to report for induction had been cancelled, the board proceeded to consider his request for a reopening of his classification. The board refused to reopen on the ground that "the information submitted did not warrant reopening of the classification." It noted that he had previously applied for enlistment in a reserve program, for which he had not been accepted, and as a result it was "the opinion of the board that the registrant was seeking to

avoid induction." In reversing the conviction for refusal to submit to induction, the Court stated:

> "It cannot be held that the statements and information in appellant's letter and executed form No. 150, if true, would not be able to provide basis for a conscientious objector classification and so could not justify a consideration of the question of change in his classification. . . . what the board actually did, as the implications of its minutes reflect, was to engage in evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation, entitled to credence in fact . . .
>
> [T]he local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made, so as to entitle consideration and evaluation to be engaged in thereafter under the general classification procedure of the regulations. It shortcut the consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file. It weighed the information contained in the appellant's form against other probative factors (such as his attempted reserve enlistment during the month preceding) and arrived at the judgment that he was not in truth a conscientious objector but was merely seeking to avoid induction." 388 F.2d at 973, 976.

In the case at bar the board weighed the information contained in petitioner's SSS Form 150 and in the supporting letters he submitted against other probative factors based on the information contained in his entire file, principally his previous claim for an occupational deferment, and concluded that he was not "in truth a conscientious objector but an anti-poverty

worker seeking to avoid induction under the guise of being a conscientious objector." The Court of Appeals sanctioned such evaluative consideration and engaged in it on its own by weighing the information contained in the SSS Form 150 and supporting letters against other information, concluding that the petitioner's opposition to war was not based on religious training and belief, as he contended, but upon "essentially political, sociological or philosophical views and his conscience." And it did so despite the fact that the action of the board must be supported on the grounds that the board gave for such action. *Gatchell v. United States*, 378 F.2d 287 (9th Cir., 1967). Its decision is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States, supra.*[1]

What the Court of Appeals is doing is to completely obliterate any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial of the classification on the merits after a reopening under 32 C.F.R. Section 1625.2. It thus allows a board to determine a registrant's claim for reclassification on the merits under the guise of determining

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1. In *Robertson v. United States*, 404 F.2d 1141 (5th Cir., 1968), which was cited in the Petition for Certiorari p. 16, the three-judge panel held that the registrant had made out a prima facie case for classification as a minister by presenting evidence that he was working 100 hours per month as a "Vacation Pioneer" and that his sect considered some Vacation Pioneers to be regular ministers. It was the view of the panel that this was sufficient to make out a prima facie case and that in denying the ministerial exemption the board in effect decided the claim on the merits.

On rehearing, the Court en banc reversed on the ground that the evidence submitted prior to the issuance of the order to report for civilian work was not sufficient to make out a prima facie case for classification as a minister. 417 F.2d 440 (5th Cir., 1969). The order to report for civilian work was issued on November 2, 1965. According to the panel, at that time the registrant had presented evidence that he was working 100 hours per month as a minister, and that although his church category was Vacation Pioneer, "there was also evidence that the Jehovah's Witnesses consider some Vacation Pioneers to be regular ministers." 404 F.2d at

that he did not make out a prima facie case, thereby depriving him of the administrative appeal to which he is entitled under 32 C.F.R. Section 1625.13.

C. The Approach of the Court of Appeals for the Sixth Circuit to Judicial Review of a Board's Refusal to Reopen a Classification Is Clearly Erroneous.

It is submitted that the reason why the Court of Appeals for the Sixth Circuit is allowing the board to determine a registrant's claim for classification on the merits under the guise of finding that he did not make out a prima facie case is that its approach to judicial review of a board's refusal to reopen is clearly erroneous. The approach taken by the Court of Appeals for the Sixth Circuit differs from the approach taken by other Courts of Appeal in two very important respects. First, it appears to be applying the same "basis in fact" test applicable to judicial review of a board's final determination on the merits to the review of the board's determination that the registrant did not make out a prima facie case. Second, it holds that the board can, without reopening the classification, engage in evaluative consideration of all the information of the regis-

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1146. The Court en banc took a different view of the evidence, saying that as of that time, he had only been spending 30 to 40 hours per month as a Vacation Pioneer, and that the Watchtower Society did *not* consider Vacation Pioneers to be ministers. It observed that, "Thus, Robertson, a Vacation Pioneer, did not qualify for the ministerial exemption even within the hierarchy of that religious sect." 417 F.2d at 445. It also observed that *none* of the evidence submitted was sufficient to warrant his reclassification. 417 F.2d at 447. Finally, it noted that the written request for classification as a minister was not made until after he had received an order to report for civilian work.

Ibid.

Therefore, while the Court en banc did not dispute the proposition that the board cannot engage in evaluative consideration of the evidence under the guise of reopening the classification, it found that the registrant did not make out a prima facie case for classification as a minister, and upheld the action of the board in refusing to reopen.

trant's file to determine whether the *new facts*, if true, would justify a change in his classification.

As to the first point, the Court of Appeals was of the opinion that "there was a rational basis for the board's determination that Mulloy had not established a case of conscientious objection." In arriving at that conclusion it looked to all the information contained in the petitioner's file and singled out certain information that in its opinion showed that his beliefs were "political, sociological and philosophical rather than religious" and certain information showing that the board could find he was not "sincere" (ignoring the fact that the board assumed he *was* sincere in his beliefs). This is the approach that may properly be taken to judicial review of a merits determination under the "basis in fact test," *Witmer v. United States*, 348 U.S. 375 (1955), but it is totally inappropriate to judicial review of a board's refusal to reopen.

The distinction between the scope of review of a board's final determination and review of a board's refusal to reopen was discussed at length by the Court of Appeals for the Ninth Circuit in *Petrie v. United States*. 407 F.2d 267, 245-5 (9th Cir., 1969). where the Court observed:

> "As applied to an action of the local board in refusing to reopen a classification pursuant to a registrant's request, the basis in fact test is substantially different in degree from that applied to the board's final classification decision. As to the latter action, basis in fact consists of 'some proof'—something which may be less than substantial evidence—to support the *evaluative classification decision* ... In comparison, the Regulations governing reopening ... have been construed to require only that the registrant present to his local board a 'prima facie case' supporting his request for placement in another classification ... Thus, 'refusal to reopen has no basis in fact if the

written request to reopen sets forth a prima facie case for reclassification and if it contains some allegations of fact in addition to those considered when the registrant was originally classified. . . ."

That Court also approved the explanation of the prima facie case test set forth in *United States v. Longworth*, 269 F. Supp. 971, 974 (S.D. Ohio 1967), to the effect that, "the board is mandated into at least looking at the facts as stated, considering whether it has previously known those facts when its prior classification was made and considering whether the facts stated, if true would to *any* reasonable mind, justify a reclassification." And in *Howze v. United States*, 409 F.2d 27, (9th Cir., 1969), the Court posed the test in terms of whether the board *would have* a basis in fact to grant the requested classification on the basis of the information that the registrant submitted.

It is clear that the Court of Appeals for the Sixth Circuit is applying a very different standard for judicial review of a board's refusal to reopen from that being applied by the Ninth Circuit. Since the Sixth Circuit's standard is the same one that it applies to review of a final determination, it is very likely, as in the case at bar, to uphold a refusal to reopen in circumstances where the Ninth Circuit would find that the refusal to reopen would constitute an abuse of discretion. The decisions of the Ninth Circuit in *Petrie v. United States, supra*, and *Howze v. United States, supra,* as contrasted with the decision of the Sixth Circuit in the case at bar, demonstrate this difference, as does the decision of the Seventh Circuit in *United States v. Freeman*, 388 F.2d (7th Cir., 1967).

If the approach of the Sixth Circuit to review of a board's failure to reopen is accepted, *the power of the courts to determine procedural fairness will be no different from their power to determine the substantive validity of the classification.*

Such a result is manifestly unsound. Indeed, the fact that the power of the courts to review the classification on the merits is so limited it necessitates a much more careful review of the board's compliance with the regulations. As pointed out in *United States v. Freeman, supra,* "The procedural framework of the draft classification process and the narrowly limited judicial review available to draft registrants made adherence to procedural safeguards crucial to the maintenance of basic fairness." It is the function of the courts to determine whether the board *has* followed the regulations, not whether there was a basis in fact for their *refusal* to do so.

The Court of Appeals for the Sixth Circuit also stands alone in its holding that in determining whether the registrant has made out a prima facie case for reopening the board can consider and evaluate all the information in the registrant's file against the new evidence which he has submitted in support of his claim. This is contrary to the express language of Section 1625.4, which says that the board shall not reopen if it is of the opinion that the *new facts,* even if true, would not justify a change in the registrant's classification. If the board is to evaluate all the information in the registrant's file, including that previously considered with respect to a claim for another classification, it is necessarily determining the claim on the merits rather than determining whether the registrant made out a prima facie case. All other courts passing on the question have looked only to the evidence submitted by the registrant in support of his claim to determine whether he has made out a prima facie case for reopening. If that evidence is sufficient to make out a prima facie case, the board is required to reopen, *and at that time it evaluates the information submitted against other information in the file.* If it denies the claimed classification on the merits, the registrant is entitled to an administrative appeal, which is denied to him if the board refuses to reopen.

See *Davis v. United States*, 410 F. 2d 89, 93-95 (8th Cir., 1969), *United States v. Freeman*, 388 F.2d 246, 249 (7th Cir., 1967), *Howze v. United States*, 409 F.2d 27, 28 (9th Cir., 1969).

The Court of Appeals attempted to justify the board's evaluative consideration of all the evidence in the file on the ground that the board had the power to investigate and determine whether the facts stated in support of the application for reclassification were true. The government has also argued that the board was justified in refusing to reopen despite the presentment of a prima facie case because the board "had reason to question the truth or sincerity of the representations." (Brief of the United States in Opposition to Certiorari, p. 19). But, as has been pointed out repeatedly, the board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. (A. 71, 72, 84, 86). There is nothing in the record to show that any board member ever raised a question as to the petitioner's sincerity, which is very understandable, since the board's position was that, "His claim, taking everything, assuming everything he said down there at that time to be so, he still did not make out a case for conscientious objection, and therefore, we saw no reason to reopen the case, because it wasn't there." 412 F.2d at 425.

Assuming *arguendo*, however, that there were doubts as to the petitioner's sincerity this would be the *clearest case* in which a fullscale reopening would be required. The keystone of classification as a conscientious objector is indeed the registrant's sincerity, and as this Court has observed in *United States v. Seeger*, 380 U.S. 163, 175 (1965):

> "Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental question of man's predicament in life, in death, or in final judgment and retribution."

It is inconceivable that the investigatory power of the board under 32 C.F.R. Section 1625.1(c) could be used as a substitute for the reopening of the classification whenever a prima facie case for classification as a conscientious objector has been established. The purpose of that subsection is to enable the board to check the accuracy of *facts*, such as whether a person is enrolled in school, or living with his family, not to make an evaluative judgment as to sincerity of belief.

Very similar to the case at bar, particularly as it relates to the investigative power of the board in connection with a reopening of the classification, is the recent decision of the Fourth Circuit in *United States v. Grier*, 415 F.2d 1098 (4th Cir., 1969). There the registrant, who had been classified I-A, wrote a letter requesting that his classification be changed to III-A (hardship deferment). He stated in his letter that his mother was a mental invalid and that his brother was a student, which meant that his family was primarily dependent upon him for support. He also completed the dependency questionnaire (SSS Form 118), setting forth substantially the same facts. The local board then requested a report on the registrant's family from the county welfare department, which confirmed the statement that his mother was a mental invalid and that she was receiving welfare payments. It next requested that the registrant's brother meet with the board and questioned him about the family's situation. At that time it decided not to grant the deferment. The Court held that the registrant had made out a prima facie case entitling him to a reopening and that the board's "extensive investigation—including the procurement of a report from the county welfare department on the condition of Grier's mother and the holding of a personal interview with Grier's brother"—was, in effect, a reopening of the classification, quoting extensively from *Miller v. United States, supra.* 415 F.2d at 1101. Again, the board had engaged in evaluative

consideration of the claim under the guise of deciding whether to reopen, and its "investigation" was not limited to ascertaining the truth of the factual statements alleged, but was designed to determine whether hardship to the family would or would not result from the induction.

What comes across most clearly in the case at bar is that *there is nothing more the board could have done and no further information it could have considered if it had in fact reopened the classification.* The petitioner presented a prima facie case for reopening based on his answers to the questions contained in the SSS Form 150 and the supporting letters. There may have been information in the file that was inconsistent with the claim of conscientious objection, although it is submitted that an analysis of the file will not reveal any such information. But if there was, it was incumbent on the board to reopen the classification and evaluate the claim on the merits. Instead, under the guise of determining whether the petitioner established a prima facie case, it concluded that he was not a "genuine" conscientious objector. In the circumstances of this case it either abused its discretion by failing to reopen the classification or it reopened the classification in fact without allowing the petitioner the administrative appeal to which he was entitled under the regulations.

D. The Government's Own Arguments, Which Have Shifted at Every Stage of the Litigation, Demonstrate That the Board Either Abused Its Discretion by Failing to Reopen or That It Reopened in Fact.

It is interesting to note how the government has shifted its position throughout this case in an effort to establish that the board neither abused its discretion in refusing to reopen nor did it reopen in fact. At the District Court level, the government argued that the action of the board was justified, since even assuming the petitioner's sincerity (which it said the board did),

he did not make out a prima facie case because he was really seeking an occupational deferment rather than classification as a conscientious objector. It stoutly argued that the board did not reopen the classification precisely because it assumed that the petitioner was truthful in his representations and sincere in his beliefs. On appeal, it added the argument that the petitioner's opposition to war was not based on religious training and belief. In its Brief in Opposition to Certiorari, it reverses itself and argues instead that the action of the board was justified despite the prima facie showing of conscientious objection on the basis of religious training and belief, because the board could find that the petitioner was not sincere. The arguments of the government have come full circle. At first it was argued that since the board assumed the petitioner to be truthful and sincere, it did not in fact reopen the classification. But when the case came before this Court, it was argued that the board found that the petitioner was *not* sincere, so that it was justified in refusing to reopen. Left unanswered is why the alleged finding of insincerity did not constitute a reopening in fact.

The government's own arguments demonstrate conclusively that in the case at bar the line between a reopening in fact and a denial of the classification on the merits following a reopening has become completely obliterated. If the board did not reopen the classification, it was a palpable abuse of discretion, because the petitioner indisputably presented a prima facie case for reopening. It could only deny the classification by evaluative consideration of all the information in the petitioner's file, and such evaluative consideration constitutes a reopening in fact, entitling the petitioner to an administrative appeal. Either way the actions of the board were violative of the regulations and of due process of law. This being so, the conviction of the petitioner, with its concomitant sentence of five years' imprisonment and a fine of $10,000 must be reversed.

II

The Court Below Erred in Its Conclusion That the Petitioner Did Not Make Out a Prima Facie Case for Classification as a Conscientious Objector, Because His Objection to Serving in the Armed Forces Was Based On "Essentially Political, Sociological or Philosophical Views and His Conscience Rather Than on Religious Training and Belief."

A. The Court Failed to Recognize That a Person Whose Religious Beliefs May Cause Him to Engage in Political Activity, Including Resistance to War and Military Service, Is Still Entitled to Classification as a Conscientious Objector so long as His Opposition to War Is, in Part, Based upon Religious Belief.

The primary reason advanced by the board for refusing to reopen was that the petitioner was really seeking an occupational deferment despite the fact that such a request had previously been denied both by the board and by the state appeals board. At the District Court level the government argued that the action of the board, taken on this basis, was justified and did not consitiute a reopening in fact. When the case was appealed however, the government changed its direction, arguing that:

> "Therefore, it is submitted that the basic requirement, 'BY REASON OF RELIGIOUS TRAINING AND BELIEF,' is missing and completely void in the information supplied in support of the registrant's claim of conscientious objection and request for a I-0 classification." (Brief of the United States in *U.S. v. Mulloy*, p. 20).

It concluded:

> "It is submitted that the Court may properly determine that the registrant did not make out a *prima facie* case of conscientious objection to military service on the basis of religious training and belief, that the facts alleged by the appellant, even if true, would not have entitled him to the classification claimed that in view of the appellant's

occupational activities, his status with the law, and his willingness to fight for a cause in which *he* believed, the submission of a claim of conscientious objection was patently frivolous . . ." (*id.* at p. 39).

The Court of Appeals was impressed by the government's argument that the petitioner was not a "religious C.O." and related that argument to the board's view that what the petitioner really wanted was an occupational deferment. It concluded that:

"Mulloy's letter dated November 17, 1967, [it was actually dated November 12, 1967] from which we have quoted indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief. He even indicated at that late date that he had not made up his mind as to whether he would go into the army. The letters which he wrote to the Board revealed that he was principally interested in an occupational deferment." 412 F.2d at 425.

According to the Court of Appeals, then, the board was justified in finding that the petitioner was not a "genuine conscientious objector," because (1) his opposition to war was based on essentially political, sociological or philosophical views and his conscience, and (2) his talking about the importance of his work in Appalachia indicated that he wanted an occupational deferment. It is clear, therefore, that the nature of the petitioner's beliefs, as found by the Court of Appeals, was a crucial element in its decision that there was a "basis in fact" for the board's refusal to reopen.

In *Sicurella v. United States*, 348 U.S. 385, 391 (1955), this Court observed:

"The Court of Appeals also rested its decision on the

conclusion that petitioner's objection to participation in war was only a facet of his real objection to all governmental authority. We believe, however, that if the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act. *Once he comes within Section 6 (j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.*" (emphasis added)

Granted that Congress has not chosen to exempt those whose opposition to war is based upon "political, sociological or philosophical views or a merely personal moral code," if one's opposition to war is based in part on religious training and belief, he is entitled to classification as a conscientious objector, although his opposition may be based on other kinds of beliefs, *i.e.*, political, sociological and philosophical, as well.

The present petitioner stated in the answers to SSS Form 150 that his opposition to war was based on religious training and belief and explained how he arrived at that position. (A. 19-22). A letter from a Catholic priest explained how opposition to participation in war was consistent with the teachings of the Catholic Church. (A. 51, 52). However, the petitioner is not a quiet pacifist. To him his religious beliefs meant becoming involved in political action, particularly working among the poor in the mountains of Eastern Kentucky. They meant working against the coal operators and strip-miners and organizing the poor for political power. To the petitioner this was directly related to his religious beliefs. As he stated in his answers to the SSS Form 150:

"As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church

attendance. And I place Thou Shalt Not Kill above An Eye for an Eye. I learned rapidly in my work in the southern Highlands the significance of life and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way. Violence only breeds violence." (A. 21-22).

As a result of his activities in Eastern Kentucky, the petitioner and others were arrested and indicted on a charge of "teaching sedition" and "advocating the overthrow of the government of Pike County." A three-judge United States District Court found that the prosecution was undertaken at least in part for the purpose of stopping organizing activities in Pike County and enjoined the prosecution under a statute which it found to be unconstitutional on its face. *McSurely v. Ratliff*, 282 F. Supp. 848 (E.D. Ky. 1967).

The petitioner's beliefs also caused him to work against the war. As he stated in his SSS Form 150 in response to the question, "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions:"

> "I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam." (A. 22).

Following his "courtesy interview" with the board, he wrote a letter saying that he expected that the board would draft him "regardless of my feelings." At that time he stated that he had not made up his mind what course he would follow. He then stated:

> "If I decided to go into the Army I will, of course, do

everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think. . . ." (A. 59).

According to the Court below, it was this letter that "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F.2d at 425.

By so holding the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious training and belief. The Court focused on the petitioner's political activity and ignored his statements of religious belief and the letters submitted in support of its claim. In so doing, it disregarded the test set forth by this Court in *Sicurella v. United States, supra.*

There is the real danger that the Court below may appear to be saying something else, namely that once a registrant engages in "political activity," particularly opposition to the war and the draft, he forfeits the claim that his beliefs are "religious." The "religious conscientious objector" then is defined as a person who does not "resist the system," but "quietly holds to his views." But the person whose religious beliefs cause him to actively resist war and conscription will be found to be a "political" rather than a "religious" conscientious objector.

The decision of the Court below with respect to the "essentially political, sociological or philosophical" opposition

to war on the part of the present petitioner is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Fleming v. United States*, 344 F.2d 912 (10th Cir., 1965). There the Court held that although the registrant might have been influenced more by sociological and philosophical views rather than by religious beliefs, since he had been influenced in part by religious training and belief, he was entitled to classification as a conscientious objector. The Court stated:

> "As we read the Seeger case, it clearly lays down the rule that before a conscientious objector classification may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code,' those factors must be the *sole* basis of his claim for the classification . . .
>
> The entire record clearly shows that his beliefs are, in part at least, based upon religious convictions. It may be true that appellant has been influenced, in the words of the hearing examiner '*** more by sociological and philosophical views than by religious beliefs or the dictates of a deity.' But it is also clear that he has been influenced by religious training and belief. Therefore, Fleming comes clearly within the definition of a "conscientious objector . . ." 344 F.2d at 916.

The record in the case at bar also clearly shows that the present petitioner has been influenced, at least in part, by his religious training and belief. The fact that for him, religious belief reflects itself in political activism, and that he cannot sharply distinguish between his religious belief and "political, sociological or philosophical views and his conscience" does not cause him to forfeit his claim to classification as a conscientious objector.

Likewise the fact that the petitioner had worked with the

poor and wanted to continue such work could not be interpreted to mean that he was not a "genuine C.O." and that what he really wanted was an occupational deferment. By seeking classification as a conscientious objector he necessarily agrees to perform civilian work contributing to the maintenance of the national health, safety and interest, as is stated on the face of SSS Form 150. Presumably anti-poverty work would qualify as appropriate civilian work, constituting "a charitable activity conducted for the benefit of the general public or carrying out a program for the improvement of the public health or welfare." 32 C.F.R. Section 1660.1. The petitioner *did indeed* talk about his work with the poor. In response to the question on SSS Form 150, "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions, the petitioner stated:

> "I am spending my life non-violently working among the poor. When I helped organize Jink Ray's resistance to strip mining, I urged non-violent methods. I was successful and violence was averted in a very tense situation." (A. 22).

He described at length his work among the poor and related this to his religious beliefs and his opposition to war. (A. 21,22). And in his letter of November 12, 1967, he related the problems of poverty to war, particularly the present war in Vietnam. (A. 58-59).

The petitioner stated his beliefs as best as he was able. These beliefs were reflected in his work among the poor as well as in his opposition to war. To imply that by stressing his work among the poor, he "waived" his claim to conscientious objector status and converted that claim to one of occupational deferment is the height of sophistry. As this Court observed in *Simmons v. United States,* 348 U.S. 397, 404, n. 5 (1955), "Registrants are not to be treated as though they were engaged

in formal litigation." At the time of his request for a reopening, the petitioner was a young man of twenty-three years, not learned in the intricacies of the law and not represented by counsel. He was seeking status as a conscientious objector and should not be denied that status because his religious beliefs were reflected in his opposition to war and in his desire to continue his work among the poor.

The conclusion of the Court below that the petitioner's opposition to war was based on "political, sociological and philosophical views and his conscience rather than on religious training and belief" caused it to commit error in two important aspects. First, it sustained the board's determination that what the petitioner really wanted was an occupational deferment. Since the Court's reasoning was that a "political activist" could not be a "genuine conscientious objector," and since the petitioner had stressed the importance of his work among the poor, the Court found a "basis in fact" for the board's determination as to the character of the petitioner's request. Secondly, the Court's conclusion as to the nature of the petitioner's beliefs furnished with an independent ground for finding a "basis in fact" for the board's action. Apart from the Court's erroneous application of the basis in fact test to a request for a reopening, as discussed previously, its decision on the question of "religious" versus "political, sociological or philosophical" belief, which caused it to sustain the board's action, is patently erroneous. *Sicurella v. United States, supra; Fleming v. United States, supra.*

B. Congress May Not Constitutionally Limit the Conscientious Objector Exemption to Those Whose Opposition to War Is Based Upon Religious Training and Belief.

Petitioner has maintained throughout these proceedings that his opposition to war was based upon conventional religious training and belief, namely the teachings of the Catholic Church

and Jesus Christ. The Court below, quoting from petitioner's letter to his board of November 12, has taken the position that his objection to serving in the Armed Forces was based upon "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." It was never suggested by the board, the government or the Court that the petitioner was not opposed politically, philosophically, as a matter of conscience or otherwise, to participation in war. Therefore, if it is concluded that the petitioner did not make out a prima facie case of conscientious objection on the basis of religious training and belief, it cannot be denied, particularly in view of the great weight that the Court attached to his letter of November 12, that he *did* make out a prima facie case of conscientious objection on the basis of "political, sociological or philosophical views and his conscience."

In *United States v. Sisson*, No. 305, this Term, and *Welsh v. United States*, No. 76, this Term, the Court will consider whether Congress may consistent with the First Amendment, limit the conscientious objector exemption to those whose opposition to war is based upon religious training and belief. If the Court decides that Congress may not constitutionally do so, that decision will require a reversal of the petitioner's conviction, for although the petitioned has maintained that the basis of his opposition to war *was* religious training and belief, the Court below—and implicitly the board—found that it was not.

Since the issue has been briefed and argued extensively in those two cases, there is little that can be added here. It should be pointed out, however, that the petitioner's case does demonstrate the patent unsoundness of the distinction between "religious" and "non-religious" conscientious objection. The petitioner's opposition to war has not been disputed at any point in the proceedings. But because he is a "political activist," as viewed by the Court below, he has been denied classification as

a conscientious objector on the ground that his opposition to war is non-religious. In an effort to obtain the classification the petitioner has attempted to delineate his religious beliefs and to distinguish them from his "political, sociological and philosophical beliefs and his conscience." As the action of the Court below indicates, this may be a practical impossibility.

III.

The Fact That the Petitioner Was Denied the Opportunity for Full Review of His Claim for Classification as a Conscientious Objector, Including Review by an Appeals Board, When Such Claim Was Presented for the First Time, Constitutes a Violation of Due Process of Law, as Guaranteed by the Fifth Amendment.

In holding that the board neither abused its discretion in refusing to reopen the petitioner's classification nor that it reopened the classification in fact, the Court below allowed the board to engage in evaluative consideration of the petitioner's claim on the merits. It is the contention of the petitioner, of course, that such evaluative consideration, under the guise of finding that the petitioner did not make out a prima facie case, is impermissible and requires a reversal of his conviction. But if it should be held that such evaluative consideration is permissible and does not constitute a reopening, then it is submitted that the denial of a full review that results from the board's summary dismissal of a claim presented for the first time is discriminatory and violative of due process.

Whenever a board summarily dismisses under 32 C.F.R. Section 1625.4 a claim that has been made for the first time, the registrant will never have had his claim reviewed by an appeals board. At the same time registrants whose claim was made at the time of the original classification or whose

classification was reopened and their claim denied on the merits do have the right of appeal. However, all three registrants have presented their claims for the new classification, here conscientious objector status, for the first time after the facts entitling them to such status have matured. To allow two of them to appeal while denying the right of appeal to the third, it is submitted, constitutes impermissible discrimination, "so unjustifiable as to be a denial of due process." *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Schneider v. Rusk*, 377 U.S. 163 (1964).

It is not contended that due process requires that there be an appeal from the board's refusal to reopen the classification in all cases. *United States v. Beaver*, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963); *Klubnikian v. United States*, 227 F.2d 87 (9th Cir., 1955), *cert. denied*, 350 U.S. 975 (1956). What is contended is that where a claim for a particular status has been made for the first time, and that claim is not on its face "clearly frivolous," the registrant must be permitted to appeal from the board's refusal to recognize that claim. The right to appeal cannot be the subject of invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). This should be equally true of administrative appeals. Since registrants whose claim was made at the time of their original classification have the right to appeal, as do registrants whose classification was reopened and the claim denied on the merits, the right to appeal cannot be denied to a registrant who has likewise presented a claim for the first time. This is what occurs where the board refuses to reopen on the ground that the registrant has not made out a prima facie case—particularly, where as here, the board is permitted to engage in evaluative consideration of the registrant's entire file in order to determine whether he has made out a prima facie case.

Directly in conflict with the decision of the Court below on

this issue (the Court below disposed of the issue by saying that "other claims of error are insufficient to warrant reversal") is the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States,* 388 F.2d 973 (9th Cir., 1967). In holding that a local board could not cut off a registrant's appeal rights by refusing to reopen under Section 1625.4 when it had, in fact, "engaged in a general consideration and evaluation of the claim," the Court first observed that such action "could not be harmonized with the provisions and purposes of Section 1625.2 and 1625.11." It went on to hold that if such power existed, the action of the board would be discriminatory and violative of due process. The Court stated:

> "But if such an implied power can be regarded as being intended to exist under the regulations, then it must be held, we think, that the discrimination which the board effects against a conscientious objector claimant by dealing with his situation on this basis, as opposed to another such claimant of similar prima facie situation to whom it accords a reopening, would be a violation of the due process clause of the Fifth Amendment.
>
> In the latter situation, a conscientious objector claimant would be left with the procedural rights to appear, be heard, and take an appeal, while in the first situation there would be a foreclosure of these substantial incidents to a similar claimant. For a local board to be able to effect a discrimination of such substance between prima facie situations of legal equality would seem to us to constitute a matter of basic unfairness and hence to be, in the language of *Bolling v. Sharpe* and *Schneider v. Rusk,* 'so unjustifiable as to be violative of due process'." (citations omitted) 388 F.2d at 976-977.

It is because of this discrimination between "situations of prima facie legal equality" that the power of the board to

engage in evaluative consideration under the guise of refusing to reopen should not be recognized. But if such power is recognized as it was in the Court below, then it is submitted that the exercise of that power in the circumstances of the present case is violative of due process of law.

IV.

The Petitioner Was Denied Due Process of Law, as Guaranteed by the Fifth Amendment, in That His Claim for Classification as a Conscientious Objector Was Not Given Full and Fair Consideration by His Selective Service Local Board.

A. The Members of Petitioner's Board Refused to Give Full and Fair Consideration to His Claim, in Particular, By Refusing to Read with Some Care His Detailed Answers to SSS Form 150.

The right to a full and fair hearing that is an essential ingredient of administrative due process, *Morgan v. United States*, 289 U.S. 468 (1936), applies with equal force to a hearing by a selective service local board. *Bejelis v. United States*, 206 F.2d 354 (6th Cir., 1953). The petitioner is contending that the members of the local board are required to read a registrant's file with some degree of care before rendering its decision on his classification, and that when there is a claim for classification as a conscientious objector, that reading includes as a minumum, the detailed answers to SSS Form 150.

It seems agreed that the petitioner's "courtesy interview" with his local board on November 9, 1967 lasted about ten minutes. (A. 77, 82). What stands out from the record is that the petitioner's file, particularly his SSS Form 150 was not carefully examined by *any* member prior to the meeting, or at any time thereafter. The testimony of the board members

demonstrates this most clearly. Board member Downes testified as follows:

Q. Prior to the meeting did you read his file, his Selective Service file?

A. The file is available before he presented himself, yes.

Q. And you read it?

A. I scanned it because I am the newest member on this particular board *and I was not familiar with what was in his file at all.* (emphasis added).

* * * * * *

Q. Do you know if, when you went through Mr. Mulloy's file, did you find that he had completed the SSS Form 150?

A. I couldn't say.

Q. You don't remember that?

A. No, because as I recall his file was fairly thick.

Q. Fairly thick.

A. And I'm not familiar with the various forms by their particular numbers.

Q. Well, you knew though that applicants for Conscientious Objector status must complete a special form; is that correct?

A. Yes.

Q. Did you read, then, the form that he had filled out, his form for classification as a Conscientious Objector?

A. I don't remember." (A. 74, 75).

Board member Wolking testified that he read the file, but he did not specifically recall having gone through it nor did he recall how much time he spent on it. His conclusion was that the petitioner was asking for conscientious objector status because "he had important work in Eastern Kentucky." (A. 84). Board member Rickert, who was not present at the November 9th "interview" but who voted, nonetheless, at the January 11th

meeting; at first testified that he had not read the petitioner's responses to SSS Form 150. (A. 87, 88). He then said that he looked at the file before the meeting of January 11. (A. 88).

Board chairman Sherman testified that the board members "looked over his file before he came in as we do anybody else." (A. 91). Board member Downes corroborated that the only kind of consideration of the file was that which took place, if at all, immediately preceding the "interview," stating:

"A. At that time, the clerk said that an individual was waiting—was there, and all of the board members, I believe, or those who cared to look in his file, but as far as reading each separate sheet is concerned, I don't believe that I did this."

Q. * * * * I am concerned about what we call the SSS Form 150 which is the special form for Conscientious Objectors that all applicants must complete. You don't recall reading that?"

A. Not specifically." (A. 77).

He also testified that "the only time I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started." (A. 81). His decision was based, he said, "on the basis of what was discussed, what we were able to glean from his own statements." (A. 81).

It is clear that petitioner's claim for classification as a conscientious objector was considered in a very superficial manner. No board member went through the file thoroughly, reading and analyzing the detailed answers he gave to the questions contained in SSS Form 150. The file was "scanned" or "looked at," if at all, only immediately preceding the interview with the petitioner, and it is not clear that this "scanning" even included looking at the SSS Form 150. During the brief interview no questions were directed to the content of

SSS Form 150. In fact the board members did not recall asking any questions at all. (A. 77, 82). Then the members met for about ten minutes and decided that "the new facts, even if true, did not entitle him to classification as a conscientious objector."

It is submitted that the above clearly demonstrates that the board did not give full and fair consideration to the petitioner's claim. At a mimimum the board members were required to *read* the answers to the detailed questions contained in SSS Form 150, if not his entire file. Careful consideration—or at least reading—of the pertinent information in the registrant's file, particularly the information relative to the classification that he was claiming, would seem to go to the essence of administrative due process. In *Zenith International Film Corp. v. City of Chicago*, 291 F.2d 785 (7th Cir., 1961), it was held that the owner of a film declared to be obscene had been deprived of a full and fair hearing because administrative officials had failed to view a film in its entirety before declaring it to be obscene. The same reasoning would dictate that a board should be required to read a registrant's entire file, or at least his answers to the SSS Form 150, before concluding that the new information submitted, even if true, would not entitle the registrant to classification as a conscientious objector.

It may be objected that the board is "very busy" and that it cannot review the file of each registrant thoroughly. But the right to a full and fair hearing is a matter of due process, so that it cannot be compromised "on the footing of convenience or expediency." *Ohio Bell Telephone Co. v Public Utilities Commission of Ohio*, 301 U.S. 292, 305 (1937). It would also seem that due process should not depend on whether the members of the administrative tribunal receive compensation for their services.

Realistically, no board's caseload is such that it is unable to

give full and fair consideration to those cases where careful deliberation is required. The great majority of cases coming before a local board will be routine. Where a registrant has presented no evidence entitling him to a different classification, he is classified as 1-A. 32 C.F.R. Section 1622.10. A number of classifications entitling a registrant to deferment, such as II-S, are also routine, because the statute and regulations clearly spell out the conditions. See, *e.g.* C.F.R. Section 1622.25. Requests for classification in class 1-O will be fairly rare in relation to the board's total caseload. When such a request is made, the board may properly be expected to give it detailed and careful consideration.

If a board is not required to give such consideration to a request, if it is not at least required to read the SSS Form 150 of a registrant who has claimed classification as a conscientious objector, the registrant is put in a very difficult and unfair position. Judicial review of his substantive classification is extremely limited, and has been described as "the narrowest known to the law." *Blalock v. United States,* 247 F.2d 615, 619 (4th Cir., 1957). If the board is permitted to engage in the kind of superficial "scanning" that occurred in the case at bar, and then conclude that a prima facie case was not established, *at no time in the administrative and judicial process will the merits of the registrant's claim have been considered fully.* The present petitioner gave detailed answers to the questions contained in SSS Form 150. The board members could not testify that they gave careful consideration to those answers, and some did not remember even "scanning" them. The Courts, operating under the "basis in fact" test, cannot evaluate the answers on the merits. Unless the board members are required to *read* his answers and carefully consider them, his completion of the form turns out to be meaningless. The petitioner now faces a sentence of five years' imprisonment and fine of $10,000

because the board found that he did not make out a prima facie case for classification as a conscientious objector. And it arrived at that decision by a "scanning" of his file by some members only and a ten minute interview. Surely this cannot be considered due process of law.

B. The Members of Petitioner's Board Lacked a Minimum Understanding of the Applicable Statute and Regulations, and Thus Were Unable to Pass Intelligently on His Claim for Classification as a Conscientious Objector.

It has been observed that in regard to the draft law, "probably no provisions have been examined more closely than those relating to the deferment of conscientious objectors." *United States v. Gearey*, 368 F.2d 145, 146 (2nd Cir., 1966). And yet it is doubtful whether the members of the petitioner's board had any more than the vaguest understanding of the applicable statute and regulations in regard to that classification. This is not surprising, since the clerk of the board testified that in her seventeen years with the Board, *no registrant had ever been assigned to civilian work as a conscientious objector.* (A, 74). The testimony of the board members concerning their understanding of the applicable statute and regulations is most revealing. In response to the question of whether he was "thoroughly familiar with the regulations governing classification of conscientious objectors," board member Downes testified:

> "I can't say that I'm thoroughly familiar. As I indicated to you before, I am perhaps the youngest person on the particular board."

He then stated that he had an understanding of "what a conscientious objector is" in a general sense. This was:

> "Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity."

If a registrant could obtain conscientious objector status simply by "saying" that he is one, the present petitioner would not now be under a sentence of five years' imprisonment. The dialogue continued:

> Q. Well, the draft Board has to make that decision, doesn't it? He can't just do it on his own.
>
> A. The draft Board, I thought now, was involved primarily with determining the availability of people." (A. 78).

Board member Wolking did not know what classification was to be given to conscientious objectors. He also seemed to think that by signing SSS Form 150 the petitioner stated that he would *not* perform civilian service in the national interest. (A. 85, 86). Board Chairman Sherman, an attorney, was completely confused regarding the distinction between classification in Class 1-O and classification in Class 1-A-0. He did not know if the board could classify a person as qualified for noncombatant service only, and thought that if the board found that the petitioner was a conscientious objector, he would be classified in Class 1-A-0. (A. 90, 91). His understanding of a conscientious objector was "one who has conscientious scruples against taking another person's life even under any circumstances." (A. 90). This, of course, is not the definition given in the statute, which is based upon opposition to particiapation in *war* in any form, and one who would take human life in self defense may still be classified as a conscientious objector. *Taffs v. United States*, 208 F.2d 329 (8th Cir., 1953), *cert. denied*, 347 U.S. 928 (1954).

The foregoing makes it abundantly clear that the board members had little or no understanding of the law governing the petitioner's claim for conscientious objector status. Administrative agencies, including selective service local boards, are deemed to have "expertise" in the law they are administering. The petitioner's local board not only lacked such "expertise"

when it came to determining a question of conscientious objection, but clearly demonstrated administrative incompetence.

To allow a board so constituted to dispose of petitioner's request in itself amounts to a denial of due process of law, since the members of the board were not capable of making a reasoned and informed decision.

CONCLUSION.

For the reasons stated herein, it is respectfully submitted that the judgment of the Court below should be reversed and the conviction of the petitioner be set aside.

Respectfully submitted,

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APPENDIX A

Pertinent Text of Statute Involved

Military Selective Service Act of 1967
[50 App. U.S.C. Section 451 et seq.]

50 App. U.S.C. Section 456 (j)

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and beliefs" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title.

50 App. U.S.C. Section 462 (a)

Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not

more than five years or a fine of not more than $10,000 or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Pertinent Text of Regulations Involved

Selective Service Regulations
[32 C.F.R. Ch. XVI]

Part 1625–Reopening and Considering Anew Registrant's Classification.

Reopening Registrant's Classification

1625.1. Classification Not Permanent.–(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.–The local board may reopen and consider anew the classification of a registrant (a) upon the

written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3 When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class 1-S because he is satisfactorily pursuing a full-time course of instruction at a

college, university, or similar institution of learning.

1625.4 Refusal To Reopen and Consider Anew Registrant's Classification.–When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

Classification Anew

1625.11 Classification Considered Anew When Reopened.–When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 Notice of Action When Classification Considered Anew.–When the local board reopens the registrant's classifi-

cation, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

1625.13 Right of Appeal Following Reopening of Classification.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 Cancellation of Order to Report for Induction or for Civilian Work by Reopening of Classification.—The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 655.

JOSEPH THOMAS MULLOY,
Petitioner,

vs.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE.

As *Amici Curiae* Wayne Spencer Deri, Lucian Gatewood, Dennis J. Iannarelli, Richard Charles Kendall, Charles D. Knight, William Lawrence Morton, John Francis Paul, William N. Robinson, Mordecai Rotem, Charles Stikes, Richard L. Swogger, John G. Toth, Jr., Raymond Leo Vincent, Jr., and Paul V. von Schoeler respectfully move that they be granted leave to file their brief in support of the petitioner herein. Their interest is stated in the brief, which is attached hereto. Written consent for the filing of this brief on or before March 16, 1970, has been granted by both parties and has been filed with the Clerk.

Respectfully submitted,

RALPH RUDD,
BENJAMIN B. SHEERER,
Attorneys for Amici Curiae.

In the Supreme Court of the United States

OCTOBER TERM, 1969.

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JOSEPH THOMAS MULLOY,
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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR AMICI CURIAE,

Wayne Spencer Deri, Lucian Gatewood, Dennis J. Iannarelli, Richard Charles Kendall, Charles D. Knight, William Lawrence Morton, John Francis Paul, William N. Robinson, Mordecai Rotem, Charles Stikes, Richard L. Swogger, John G. Toth, Jr., Raymond Leo Vincent, Jr., and Paul V. von Schoeler.

INTEREST OF THE AMICI CURIAE.

The *amici curiae* are Selective Service registrants.[1] Each of them has presented to his local board facts which if true would justify a change in his classification, it is believed, but in each case the local board has failed or refused to reopen the classification and classify the registrant anew.

[1] For purposes of identification, their Selective Service numbers are as follows:

Wayne Spencer Deri, 33-46-45-213;
Lucian Gatewood, 15-45-45-54;

(Continued on following page)

One of the essential issues presented by this case and by the opinion of the Court of Appeals arises from the fact that the petitioner claims he presented facts to his local board which, if true, would have justified a change in his classification, but that his local board refused to reopen his classification and classify him anew. The Court of Appeals held that the failure to reopen was proper.

Amici support the position of the petitioner Mulloy that upon the presentation of new facts which would justify a new classification, the local board must reopen and classify anew.

Thus, in the case of each of the *amici curiae* his future classification, his right to a writ of habeas corpus after induction; or his right to be acquitted after refusing induction may depend on this Court's ruling in this case.

(Continued from preceding page)

Dennis J. Iannarelli, 33-32-46-271;
Richard Charles Kendall, 33-4-45-361;
Charles D. Knight, 33-32-46-1279;
William Lawrence Morton, 33-31-49-1037;
John Francis Paul, 33-11-47-464;
William N. Robinson, 33-31-44-915;
Mordecai Rotem, 33-71-44-645;
Charles Stikes, 15-47-45-82;
Richard L. Swogger, 33-46-45-379;
John G. Toth, Jr., 33-470-50-1156;
Raymond Leo Vincent, Jr., 33-112-44-110;
Paul V. von Schoeler, 2-17-44-94.

QUESTIONS PRESENTED.[2]

1. If new facts, not frivolous, are presented to a Selective Service local board pursuant to 32 CFR § 1625.2, and if those facts would justify a change in the classification of the registrant if they are true, does the board have discretion to refuse to reopen the classification and classify the registrant anew?

Amici answer NO.

2. More particularly, may the board refuse to reopen and reclassify on the ground that the facts claimed are untrue, whether with or without investigation by the board?

Amici answer NO.

3. In determining whether a Selective Service local board has committed procedural error, is a court's scope of review limited to the basis-in-fact test enunciated in *Estep v. U. S.*, 327 U.S. 114, 1946?

Amici answer NO.

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[2] These questions relate to the subject matter encompassed by the petitioner's questions 1 and 3. The petitioner's questions 2 and 4 are vital questions to many registrants, including some of the *amici* herein, but since they are not of common concern to all the *amici*, they are not dealt with in this Brief.

SUMMARY OF ARGUMENT.

The Selective Service regulations provide for review of classification decisions by personal appearance and appeal. They provide for a reopening of a registrant's classification to consider new facts whenever such facts are claimed and whenever such facts would, if true, justify a change in classification. Due process requires that these facts be given full consideration and, if necessary, that the registrant be provided an opportunity to demonstrate the truth of the facts claimed in a personal appearance before the local board and again, if necessary, to have review of the board's decision on appeal. The Courts of Appeal of all the circuits that have ruled on this question (not excluding the Sixth Circuit) have held that reopening under such circumstances is mandatory.

The Court below in this case attached a further condition to the right of reopening that effectively destroys it. It held that the facts stated must be true and that the local board has power to determine their truth and refuse to reopen if it finds that they are untrue. The determination of truth is not an easy matter and is the central object of the procedures of due process of law. For the board to undertake to make a determination unilaterally, *ex parte*, without opportunity for the registrant to discuss with the board whatever error he believes it may have made would subject the registrant completely to the whim, caprice or mistake of the local board in a manner completely violative of due process of law.

In a case involving a claim of conscientious objection, the refusal to reopen should be subject to even closer scrutiny because such a claim adds First Amendment considerations to those of the Fifth Amendment, and an erroneous classification would subject the registrant to

burdens upon his freedom of conscience and freedom of exercise of his religious belief that are peculiarly abhorrent in our constitutional system.

The scope of review in Selective Service matters is limited to an inquiry as to whether there is a basis in fact for the classification that has been issued to a registrant only with respect to a local board determination made in accordance with the regulations. Before a court reaches the application of that test it must be determined whether the local board's decision was made in accordance with the regulations, and this determination should be made *de novo* on the basis of a preponderance of the evidence. The determination as to whether a local board properly or improperly refused to reopen a registrant's classification does not involve the merits of the classification but only the procedural question as to whether a *prima facie* case was stated. This is a question of law, not of fact, and is not subject to the basis-in-fact test. It should be approached as a problem to be determined *de novo* and in accordance with a preponderance of the evidence. Thus the Court of Appeals applied the wrong test as to scope of review, and for this reason as well as the others, the petitioner's appeal should be granted.

ARGUMENT.

A. Procedural background.

Normally a registrant is classified initially on the basis of information supplied by him on a Classification Questionnaire, (SSS Form 100),[3] mailed to him by the local board.[4]

The local board is required to receive and consider all pertinent information presented to it. It considers each registrant to be available for military service until his eligibility for deferment or exemption is clearly established to its satisfaction. Thus, the local board has the responsibility to decide, subject to appeal, the class in which each registrant shall be placed at any time based on the information before it.[5]

Promptly after classification the registrant is mailed a notice thereof on a Notice of Classification (SSS Form 110).[6]

As the registrant is advised on the back of the Notice of Classification (SSS Form 110), his classification is followed by a right to have a personal appearance before the local board if he makes request for it within thirty days.[7] After the personal appearance, whether or not the local board determines that the new information presented at the personal appearance justifies a change in the registrant's classification, it is required to mail a new notice of classification (SSS Form 110) to the registrant.[8]

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[3] SSLR 2156: 3-6.

[4] 32 CFR §§ 1621.9-.10.

[5] 32 CFR § 1622.1 (c).

[6] 32 CFR § 1623.4 (a). A copy of the form is set forth at SSLR 2156: 8.

[7] 32 CFR §§ 1624.1-.3.

[8] 32 CFR §§ 1624.2 (c) and (d).

From each classification by the local board including those following a personal appearance the registrant has the right of appeal to an appeal board by giving written notice to the local board within thirty days (sixty days in some instances).[9] Thus the registrant may appeal after the local board's initial classification, or he may first request a personal appearance before the local board and then appeal. In either case the appeal is to the appeal board for the area in which the local board is located,[10] unless the registrant lives or works in another area and has asked for the appeal to go to the appeal board having jurisdiction there,[11] or the registrant is seeking an occupational deferment, works in a different area, and requests appeal to the appeal board having jurisdiction over his place of work.[12] In most cases, the area served by each appeal board is an entire federal judicial district.[13] There is no personal appearance before the appeal board; the board acts solely on the basis of information contained in the record received from the local board, plus general information concerning economic, industrial and social conditions.[14]

If one or more members of the appeal board dissent from the classification it gives, the registrant may appeal to the President.[15] If the appeal board is unanimous in its decision, either the State Director or the [National] Director of Selective Service may take an appeal to the

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[9] 32 CFR §§1624.2(e), 1626.2.

[10] 32 CFR §1626.13(b).

[11] 32 CFR §1626.11(c).

[12] 32 CFR §1626.11(b).

[13] 32 CFR §1604.21.

[14] 32 CFR §1626.24(b).

[15] 32 CFR §1627.3.

President.[16] An "Appeal to the President" is determined by the National Selective Service Appeal Board.[17]

B. Reopening of classification.

At any time after a registrant has been classified his circumstances may change. Local boards routinely forward to registrants from time to time a Current Information Questionnaire (SSS Form 127) [18] in order to update their information about the registrant. In addition, there are other forms appropriate for specific circumstances, such as the Dependency Questionnaire (SSS Form 118)[19] and the Special Form for Conscientious Objector (SSS Form 150).[20] Moreover, the local board may secure information from welfare and governmental agencies and has the power to subpoena witnesses.[21] (The latter power is thought to be rarely used).

The provisions chiefly involved in this appeal and in this Brief of *amici curiae* are those relating to the reopening of a registrant's classification when the registrant himself presents new information and asks that his classification be reopened. This situation is provided for by the regulations in 32 CFR Part 1625. These sections of the regulations are set forth at pages 4a-7a of the petitioner's brief on the merits.

Briefly summarized and as pertinent here these sections provide that the local board may reopen and consider anew the classification of a registrant upon his written request if he presents facts not considered when he was

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[16] 32 CFR § 1627.1 (a).

[17] 32 CFR §§ 1604.6 (a), (b).

[18] SSLR 2156:11.

[19] SSLR 2156:9-10.

[20] SSLR 2156:14.1-14.2.

[21] 32 CFR §§ 1621.14, 1621.15.

classified and which, if true, would justify a change in his classification.

Perhaps the most important words in this section (32 CFR § 1625.2) are the words "if true." These words have generally been interpreted by the courts as identifying a *prima facie* case, and each court of appeals that has ruled on this question (not excepting the Sixth) has held that when such a case is presented it is constitutionally mandatory for the local board to reopen the registrant's classification and classify him anew.[22]

This holding of the Courts of Appeal is based upon the consequences that flow from the local board's decision either to reopen the classification or not to reopen it. If the local board reopens the classification, it shall again classify the registrant "in the same manner as if he had never before been classified." "Such classification shall be and have the effect of a new and original classification, even though the registrant is again placed in the class that he was in before his classification was reopened." [23]

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[22] Second Circuit: *U.S. v. Vincelli*, 215 F.2d 210, reh. den. 216 F.2d 681, 1954.

Third Circuit: *U.S. ex rel. Berman v. Craig*, 207 F.2d 888, 1953.

Fourth Circuit: *U.S. v. Grier*, 415 F.2d 1098, 1969.

Fifth Circuit: *Olvera v. U.S.*, 223 F.2d 880, 1955; *Robertson v. U.S.*, 404 F.2d 1141, 1960, rev'd on other grounds, 2 SSLR 3291.

Sixth Circuit: *Townsend v. Zimmerman*, 237 F.2d 376, 1956.

Seventh Circuit: *U.S. v. Ransom*, 223 F.2d 15, 1955; *U.S. v. Freeman*, 388 F.2d 246, 1967.

Eighth Circuit: *Vaughn v. U.S.*, 404 F.2d 586, 1968; *Davis v. U.S.*, 410 F.2d 89, 1969; *U.S. v. Rundle*, 413 F.2d 329, 1969.

Ninth Circuit: *Stain v. U.S.*, 235 F.2d 339, 1956; *Miller v. U.S.*, 388 F.2d 973, 1967; *Petrie v. U.S.*, 407 F.2d 267, 1969; *Howze v. U.S.*, 409 F.2d 27, 1969; *Mizrahi v. U.S.*, 409 F.2d 1219, 1969.

Tenth Circuit: *Warren v. Abernathy*, 198 F.2d 622, 1952.

[23] 32 CFR § 1625.11. This terminology is different from that of 32 CFR § 1624.2(c), which indicates that a classification is "reopened" only when it is changed.

The registrant is to be notified of the new classification[24] and then has the same right of appearance before the local board and the same right of appeal as in the case of an original classification.[25]

Thus, the Courts of Appeal have noted that the failure or refusal of the local board to reopen the classification prevents the registrant from having an opportunity for personal appearance and appeal. They have therefore held that where the necessary *prima facie* case has been presented, this prevention of opportunity for personal appearance and appeal is a denial of due process of law.[26]

C. The opinion below.

The Sixth Circuit opinion in the *Mulloy* case directly contradicts the doctrine that reopening is mandatory when a *prima facie* case is stated. After quoting on pages 7 and 8 (Appendix) from 32 CFR §§ 1625.2 and 1625.4 the Court says:

> "Under regulation 1625.2, the board has discretion to determine whether or not it will reopen a classification, but Regulation 1625.4 appears to be mandatory in that the board shall not reopen the classification when it is of the opinion that the facts if true do not justify a change in classification."

This conclusion of the Court results from too shallow a reading of the regulations, looking only to the common meanings of the verbs "may" and "shall." The result of this reading would be that while the local board has no discretion to grant a reopening when a *prima facie* case is not stated, yet if a *prima facie* case is stated, that is, if facts are stated which, if true, *would* justify a change in

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[24] 32 CFR § 1625.12.

[25] 32 CFR § 1625.13.

[26] See cases cited in Footnote 22, above.

the classification, the local board may either grant or refuse a reopening of the classification in its "discretion."[27] If that were so, what would guide the board's exercise of this "discretion"? No standard appears. May it grant the reopening because it likes religious quietists and deny it because it dislikes religious activists like Mulloy? Such arbitrary and uncontrolled discretion, if the local board had it, would seem to be an improper delegation of legislative power, completely repugnant to due process of law. The regulations should not be read to intend such a result if that reading can be avoided.

That reading is easily avoided. The regulations grant the local board a power to reopen when certain conditions are fulfilled, but only when those conditions are fulfilled. The "shall not" clause (1625.4) is simply the complement of the "may" clause (1625.2). Together they occupy the field. The power is not granted idly. When the conditions are fulfilled, the power is intended to be exercised. If it had been intended that when *these* conditions are met the board must look to still further conditions to determine whether to reopen, the further conditions would have been stated. The omission to state further conditions implies that no further conditions must be met and that the board must therefore reopen when *these* conditions are fulfilled.

But the courts that have adopted the rule that reopening is mandatory when the required facts are presented have looked straight to the constitutional requirement of due process and have determined that in effect "may" means "shall" (in 1625.2), for otherwise the registrant is deprived of opportunity to establish the truth and validity of his claim by personal appearance and appeal.

This constitutional principle the Sixth Circuit opinion

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[27] This interpretation was expressly rejected in *Olvera v. U.S.*, 223 F.2d 15, 7th Cir., 1955.

ignores. It quotes *Smith v. United States*, 157 F.2d 176 (4th Cir., 1946) and *United States v. Bartelt*, 200 F.2d 385, 389 (7th Cir., 1952) as sustaining the local board's discretion. But *Smith* was decided before the constitutional principle seems to have been recognized, and the only one of the cases that recognized this doctrine that preceded *Bartelt* was *Warren v. Abernathy*, 198 F.2d 622 (10th Cir., 1952). *Warren v. Abernathy* did not contain a full statement of the doctrine. It held that a refusal to reopen was proper because certain facts necessary to justify a change in classification were not shown, and stated the affirmative doctrine of mandatory reopening only obliquely:

> "We should not be understood as holding, however, that an arbitrary and capricious refusal to reopen and consider anew registrant's classification on a proper showing would not be open to judicial review."

The Sixth Circuit then proceeds to mis-state the holdings of the two *Gearey* cases, *United States v. Gearey*, 368 F.2d 144 (2nd Cir., 1966), and 379 F.2d 915 (2nd Cir., 1967). The Court says:

> "In *Gearey*, the board considered on the merits the request to reopen a classification after an order to report for induction, and the Court held that there was a rational basis for the board's determination that the registrant was not a genuine conscientious objector and the board therefore was not required to reopen his classification."

We do not so read the *Gearey* cases. In *Gearey I*, the Court held that because the registrant's claim of conscientious objection had not been asserted until after the induction notice had been issued, the local board must determine whether the applicant's beliefs matured before the induction notice or not until afterwards, and that only if

they matured after the induction notice and thus constituted a change of status resulting from circumstances over which the registrant had no control would the registrant be entitled to be reclassified by the local board. The local board had told Gearey that it did not believe he was a genuine conscientious objector and the Court of Appeals remanded the case to the District Court to determine whether the local board had meant that he never was or was not before the induction notice was sent. If it was the latter, implying that the registrant had become a conscientious objector after the induction notice, the indictment must be dismissed, the Court of Appeals said.

Gearey II simply sustained the refusal to reopen the classification on the basis of a District Court finding that the local board had refused to do so on the ground that there had been no change of status due to circumstances over which the registrant had no control. It sustained the board's refusal to grant the I-O classification on the ground that although it would have been willing to waive the lateness of claim if convinced of Gearey's sincerity, it was not so convinced and had basis in fact not to be.

Section 1625.2 imposes a significantly heavier burden for reopening a classification after an induction notice has been sent to the registrant. Then he must show the new facts he relies on came about through circumstances beyond his control. This provision is not involved in this case.

The next paragraph of the Court of Appeals opinion in *Mulloy* says that appellant's contention if upheld would result in interminable delays. It quotes *U.S. v. Taylor*, 351 F.2d 228 (6th Cir., 1965). But the *Taylor* case did not deny that reopening is mandatory when a *prima facie* case is presented before an induction notice. It noted that there had been no finding that Taylor's conscientious objection

had matured after the induction notice and concluded that it seemed reasonable for the regulations to provide that a claim of conscientious objection must be made before the order to report for induction. The Court was referring to a claim of conscientious objection that apparently existed long before the induction notice but was not asserted until afterward. In that case, reopening is expressly barred by the proviso that follows 32 CFR § 1625.2(b), a provision not involved in *Mulloy*, as we noted above.

As for interminable delays there is nothing more than an imaginary danger of a registrant avoiding induction through false statements with respect to his eligibility for classification as a conscientious objector. Severe criminal sanctions await those presenting perjured testimony. Moreover, under the Executive Order of November 26, 1969, establishing the new lottery or random selection system, the amendment of 32 CFR § 1631.7(a), in its first proviso bars avoidance of induction by delay except for the rare registrant whose liability has not been extended by a deferment under § 6 of the Act.[28]

D. The most serious error.

In our view the Court of Appeals committed its most serious error in the following paragraph (Appendix, Page 9):

> "Under Mulloy's contention, all a registrant needs to do is to state facts in support of his application and the Board is limited to his statement. In our judgment, the facts stated must be true and the Board has the power to investigate and determine the truth. Suppose a registrant who is classified I-A requests the Board to reopen his classification and place him in 3-A, alleging that he is living with and supporting his

[28] 50 USCA App. § 456, as provided in the second proviso of § 6(h)(2), 50 USCA App. § 456(h)(2).

> wife and family. If appellant's allegations were true, the Board would be obligated to reopen his classification and reclassify him. *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956). However, the Board, under the investigative powers granted to it in 32 C.F.R. § 1625.1(c), may learn that the allegation was false. Is the Board nevertheless required to reopen his classification and reclassify him? We say, 'No.'"

The Sixth Circuit seems to seek defense against a danger greater than exists. It seems ignorant of the fact that other courts had already held that the classification need not be reopened if the facts stated are "frivolous, wholly unsubstantial, and unworthy of any consideration."[29] Nor did it seem aware that other courts have indicated that reopening is not required unless the facts stated would, if true, justify a reclassification to any reasonable mind.[30] Nor did the Sixth Circuit in *Mulloy* seem aware that another case had previously held that the problem is whether the facts stated provided a basis in fact to *grant* the change in classification requested.[31]

Not recognizing these limitations on the right to reopening, the Sixth Circuit seized upon a limitation that goes much too far:

> "In our judgment, the facts stated must be true and the board has the power to investigate and determine the truth."

This goes too far because it directs the local board to make an *ex parte* determination of fact without opportunity for the registrant to offer rebuttal or correction in the event the board is misinformed or draws an erroneous

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[29] *Albert Stain v. U.S.*, 335 F.2d 339, 9th Cir., 1956. *U.S. v. Vincelli*, 215 F.2d 210, reh. den. 216 F.2d 681, 2nd Cir., 1954.

[30] *Petrie v. U.S.*, 407 F.2d 267, 9th Cir., 1969, quoting *U.S. v. Longworth*, 269 F. Supp. 971, 974, SD Ohio, 1967.

[31] *Howze v. U.S.*, 409 F.2d 27, 9th Cir., 1969.

inference. It establishes the local board, not only as judge, jury and executioner, but as investigator and prosecutor as well, without opportunity for the registrant to hear the evidence and present rebuttal.

The personal appearance is the registrant's sole opportunity to meet with his board on the subject of his classification. The regulations say he may present his case orally and in writing at that time. He may present "*further* information." He is allowed to make a summary of what transpires at the appearance and place it in his file to be considered upon appeal.

The Selective Service System was designed to produce men for the military service promptly. Only a modicum of procedural rights is granted the registrant. If the holding below is upheld, even these bare rights are substantially diminished and the System is on its way to becoming a faceless bureaucracy which controls the lives of many young men.

The prime function of a judicial trial is to determine facts. Elaborate safeguards have been established to assist in the effort to discover the truth: the right of parties to be present, to hear the evidence, to cross-examine witnesses, to present evidence on their own behalf, to exclude hearsay and other incompetent or irrelevant evidence, and to argue before the trier of fact.

Little enough of this protection is available when facts are determined by a Selective Service local board. In his personal appearance the registrant may not have counsel.[32] He may present witnesses or even have an observer present only at the sufferance of the local board.[33]

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[32] 32 CFR § 1624.1 (b).

[33] 32 CFR § 1624.1 (b).

No regulation or statutory provision expressly requires the local board to advise the registrant as to the reasoning or assumed factual basis for its decision, although courts are beginning to do so.[34]

If the local board is permitted to make investigations and determine facts as a means of determining whether or not the classification is to be reopened, the registrant will be denied opportunity to exercise even such rights as the personal appearance affords him to contribute toward the determination of the truth. Moreover, this denial will occur in the very circumstance when the registrant is most in need of being able to make his contribution toward that determination, that is, when the board thinks it has found that the registrant's claims are false. And the registrant will be deprived also of opportunity for review of the board's adverse decision by appeal.

If there is any saving grace in the Selective Service procedures, saving them from unredeemable violation of the rights of due process, it is that no substantial factual determination adverse to a registrant, no adverse judgment as to the truth of competent facts he claims, no unfavorable determination as to his credibility or the validity of his claims can be made without granting him an opportunity to discuss the matter with the local board, to find out, if it will tell him, why it has so ruled, to offer on his own behalf whatever evidence and argument he can muster in his own person, and then, if he fails before the local board, to try again (but only through his file) with the appeal board. This is the meaning the Courts of Appeal (except, now, the Sixth Circuit) have given, in essence, to the com-

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[34] *U.S. v. St. Clair*, 293 F. Supp. 337, EDNY, 1968. *U.S. v. Washington*, 392 F.2d 37, 39, 6th Cir., 1968. *U.S. v. Lonseth*, 300 F. Supp. 857, D. Ore., 1969. *U.S. v. Haughton*, 413 F.2d 736, 9th Cir., 1969. *U.S. v. James*, 2 SSLR 3231, 4th Cir., 1969.

plex interplay of the provisions for personal appearance, appeal, and reopening of classification.[35]

The doctrine the Sixth Circuit has promulgated in Mulloy would strip the registrant of this protection and leave him at the mercy of the board's star-chamber decision, unilateral, *ex parte*, unlimited by presentation of the truth if the board is in error, devoid of due process.

The error is made no more palatable by the opinion's citation of *Townsend v. Zimmerman*, 237 F.2d 376, 6th Cir., 1956. That case did not depend on the truth of the registrant's allegations, but only on the fact that they were made. Because the allegations were made and if true would have justified a change in the classification, the local board was required to reopen the classification and its failure to do so was remedied by injunction.[36]

In short, the Court below overlooked the presence and significance of the words "if true." [37]

E. First Amendment considerations.

What we have said up to now relates to the due process requirements of the Fifth Amendment, and applies with equal force whether the registrant's claim is

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[35] 32 CFR Parts 1624, 1626, and 1625, respectively. For especially pointed support for this statement of the right of review by personal appearance and appeal see the cases on *de facto* reopening:

U.S. v. Vincelli, 216 F.2d 681, denying reh. of 215 F.2d 210, 2d Cir., 1954.

U.S. v. Freeman, 388 F.2d 246, 7th Cir., 1967.

Miller v. U.S., 388 F.2d 973, 9th Cir., 1967.

Robertson v. U.S., 404 F.2d 1141, 5th Cir., 1969, rev'd on other grounds, 417 F.2d 440, 1969.

U.S. v. Grier, 415 F.2d 1098, 4th Cir., 1969.

[36] This was before the 1967 enactment of the 15th sentence of Section 10(b)(3) (15 USCA App. § 460(b)(3)).

[37] 32 CFR § 1625.2.

conscientious objection, dependency, student status, or occupational deferment. Several of the *amici curiae*, however, have made claims of conscientious objection and it is in relation to these claims that their respective local boards have refused to reopen their classifications. Thus these *amici* have a special interest in petitioner's problems of reopening as they relate to this claim of conscientious objection.

It may be that exemption from military service of conscientious objectors is not required by the First Amendment. Be that as it may, it is clear that the exemption contained in § 6(j) of the Military Selective Service Act of 1967[38] serves religious interests protected by the First Amendment—freedom of exercise and freedom of conscience. See *U.S. v. Seeger*, 380 U.S. 163, 170, 183-185. The statute insures (in the absence of administrative error) that a man will not be required to choose between going to war in violation of his religious convictions or going to jail in the free exercise of those beliefs. Indeed, the statute offers two alternative forms of service which enable a young man to avoid the constitutional dilemma of being required to either kill in violation of his religious beliefs or face incarceration as a penalty for their free exercise.

Such statutory protection of constitutional rights is illusory in the absence of adequate procedural safeguards.[39]

Thus there is a special constitutional concern under the First Amendment to assure adequate opportunities for

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[38] 50 USCA App. § 456(j), set forth on page 1a of Appendix A in the Brief for the petitioner.

[39] See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-162, 1951 (Frankfurter concurring), *United States v. Freeman*, 388 F.2d 246, 248-49, 7th Cir., 1967.

a registrant to establish that he is a conscientious objector. Determination of this fact requires peculiarly subtle and perceptive discriminations as to both the registrant's sincerity and as to the basis of his belief in an area that is essentially private and often intricate.[40]

An erroneous refusal to reopen a classification under these circumstances places the registrant on the horns of a dilemma of constitutional proportions. If he is to freely exercise his religious beliefs, he must undergo prosecution for the commission of a felony.[41] If he steps forward at induction and betrays his religious beliefs, our laws have induced an unconscionable erosion of the free exercise clause. These considerations lend additional weight to the importance of requiring a local board to accord full opportunity for consideration of a claim of conscientious objection unless no basis can be found for granting the reopening.

Thus while due process requires opportunity for personal appearance and appeal when the board is presented with facts which, if true, would justify a change in classification, the requirement of reopening in such circumstances gains additional weight from the First Amendment when the new facts constitute a *prima facie* claim of conscientious objection.

F. Scope of review.

In the Court of Appeals opinion at page 11 of the Appendix the Court refers to the limitation of the scope of judicial review to a determination of whether there is basis in fact for the classification. The fundamental statement of this limitation was contained in *Estep v. United States,*

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[40] See *U.S. v. Seeger,* 380 U.S. 163, 1965; *Witmer v. U.S.,* 348 U.S. 375, 1955.

[41] *U.S. v. Freeman,* 388 F.2d 246, 249, 7th Cir., 1967.

327 U.S. 114, 1946. As we read *Estep*, there is a sharp distinction between the scope of review to be applied when a local board has made a decision in conformity with the regulations and that which is to be applied in determining whether or not the local board has acted in accordance with the regulations. At considerable length[42] the Court demonstrated that action of a local board relating to a person outside its territorial jurisdiction, or racially discriminatory in violation of the regulations, or in violation of the deferment of governors and members of Congress, or refusing to reopen a classification and cancel an induction notice on request of the State Director or the Director, or classifying a registrant as available for military service because he was a Jew, German or Negro would be lawless and beyond its jurisdiction; and that violation of such orders would not be subject to the criminal sanctions of the Act. With respect to such lawless action beyond the jurisdiction of the local board, there seems to be no limitation with respect to the scope of review. It appears that a reviewing court's determination that the local board has so acted in violation of the law or regulations is a question to be determined *de novo* by the reviewing court in accordance with a preponderance of the evidence. And then, the Court said:

> "The provision making the decisions of the local board 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.

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[42] 327 U.S. at 120-122.

The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Clearly the basis-in-fact test is applicable only after it has been determined that the decision of the local board has been made in conformity with the regulations. It applies only to review of a decision that under another rule might involve a weighing of the evidence to determine whether the classification made by the local board was justified, that is to the question of whether the evidence sustains the conclusion reached by the local board. On that question and that question only would the basis-in-fact test seem to be applicable.

Thus it seems that a court's determination as to whether a local board has acted properly in refusing to reopen a classification does not properly call for application of the basis-in-fact test. The determination as to whether the new facts require reopening does not require consideration of evidence for the purpose of determining truth, for the truth of the facts is to be assumed for the purpose of this determination. Thus there was no occasion for the Court of Appeals to invoke the basis-in-fact test in its ruling as to whether the local board had properly or improperly refused to reopen Mulloy's classification.

We are aware that *Petrie v. United States*[43] discusses the requirement of reopening in terms of basis in fact. However, it applies a special meaning for the term "basis in fact," limiting the inquiry to a determination, as to whether or not the elements of a *prima facie* case have been presented. Most of the Courts of Appeal have not discussed reopening in terms of basis in fact and it seems

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[43] 407 F.2d 267, 9th Cir., 1969.

to us highly confusing to do so. The basis-in-fact test has so often been applied to call for a searching of the record to see if any ground can be found on which the board's decision can be sustained that the use of that term in this situation where there is properly no inquiry beyond the content of the pleadings, as it were, seems very likely to mislead the court, as perhaps happened in the *Mulloy* case in the Sixth Circuit.

We urge that the Court take this opportunity to make it clear that the limited scope of review imposed by the basis-in-fact test applies only to review of a factual determination by the local board made either on the initial classification or on reopening but in either case with full opportunity for review of the board's decision by personal appearance and appeal. We suggest that only when a board's factual determination has been subject to such review by personal appearance and appeal can it possibly be regarded as fair to limit judicial review of the decision by the basis-in-fact test. Application of the basis-in-fact test to sustain a determination of fact made *ex parte* and without opportunity for the registrant to obtain review of the determination by personal appearance and appeal would only compound the denial of due process inherent in the arbitrary and one-sided character of such a determination.

CONCLUSION.

On the basis of the errors shown herein, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and concurring opinions in the court of appeals (A. 3–13)[1] are reported at 412 F. 2d 421.

[1] "A." refers to the Appendix in this Court. "R." refers to the clerk's record of the criminal proceeding, containing the indictment, pleadings, and orders. (As noted at Pet. Br. 6–7, petitioner had earlier been a plaintiff in a civil proceeding, a pre-induction suit for injunctive relief, the record of which was treated by stipulation as part of the record in the criminal case and is on file with the Clerk of this Court. The district court denied the injunctive relief sought and, following petitioner's refusal to submit to induction and the commencement of the criminal prosecution, his appeal from that judgment was dismissed as moot.) "Tr." refers to the transcript of the criminal trial; "Civ. Tr.," to the transcript of the civil trial; and "G. Ex. 1," to petitioner's Selective Service file (Government Exhibit 1 at trial).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1969, and a petition for rehearing was denied on August 29, 1969 (A. 2). The petition for a writ of certiorari was filed on September 25, 1969, and was granted on January 19, 1970 (A. 92). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the local board abused its discretion, under the pertinent regulations, in refusing to reopen petitioner's classification as a result of his belated claim to conscientious objector status.

2. Whether the local board considered petitioner's request for conscientious objector status fairly and competently.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute (50 U.S.C. App. (Supp. IV) 456(j)) and Selective Service regulations (32 C.F.R. 1625.2, 1625.4, 1625.11, and 1625.13) are set forth in Appendix A to petitioner's brief (Pet. Br. App. 1a, 4a–7a).

STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (R. 2; Tr. 203). On April 8, 1968, he was sentenced to

five years' imprisonment and fined $10,000 (R. 20). The court of appeals affirmed.

1. Petitioner, now 25, registered with Selective Service Local Board No. 47, in Louisville, Kentucky, in June 1962, shortly after his eighteenth birthday. In June 1963 he completed and returned to the board a classification questionnaire in which, under the section headed "Conscientious Objector," he wrote "Does Not Apply." In November 1963 he was classified II–S (college student deferment) and, except for a brief period in 1964 not here pertinent, he retained that classification until March 1966 (A. 4; G. Ex. 1).

In January 1966, petitioner quit college and became employed by Appalachian Volunteers, an anti-poverty organization funded by the Office of Economic Opportunity, as an assistant to the Director of Field Operations (A. 4, 25; G. Ex. 1). On February 23, 1966, he wrote to the local board advising it of his change of status and requesting an occupational deferment (A. 24). At petitioner's request, the Associate Executive Director of Council of the Southern Mountains, Inc., an affiliated group, also wrote to the board describing petitioner's work and asking that he be deferred in the national interest (G. Ex. 1; A. 25). On March 17, 1966, petitioner was given a II–A classification (occupational deferment), to expire in March 1967 (A. 4, 31; G. Ex. 1).

On March 1, 1967, petitioner advised the local board by letter that he was still employed by Appalachian Volunteers, described and stressed the importance of his work, and requested renewal of his II–A deferment (A. 25–26). Petitioner's supervisor also asked the

board to allow petitioner to "continue his vital role" in the organization's program (A. 27–28). On May 11, 1967, in accordance with its policy of limiting deferment in such cases to one year, the board denied the requests and reclassified petitioner I–A (G. Ex. 1; Civ. Tr. 31–32).

On May 17, 1967, petitioner was ordered to report for a pre-induction physical examination on June 26, 1967 (A. 32). On May 19, in a letter addressed to "Appeals Board, Selective Service, Local Board No. 47" (which was delivered to the local board on May 23), petitioner wrote that the letter was "an official appeal to you to review and reconsider my request for an occupational deferment." Noting that he had previously been classified II–A on the basis of his work among the rural poor in the mountains of Kentucky, he said he was more deeply involved than ever in his activities and that at least one more year was needed to achieve satisfactory results (A. 29). Due to the temporary absence of the clerk of the local board, no immediate reply was made to that letter (A. 30). On June 26, 1967, petitioner reported for the ordered physical examination, was examined and was found qualified for induction (A. 32).

On July 3, 1967, the clerk of the local board wrote petitioner that the board had not overlooked his letter of May 19.[2] The clerk explained that she had been absent when the letter arrived and had not previously had the opportunity to respond to it, and asked whether petitioner wished the board first to review his

[2] The clerk referred to it as his letter of May 23 (the date the board had received it).

file and then forward it to the appeal board, or simply to forward it to the appeal board without further local board consideration (A. 30). On July 10 petitioner replied that he did not fully understand the procedures to which the clerk had referred; noted that he had been reclassified I–A in May; said he had appealed that classification "on the grounds of occupation" and had requested renewal of his II–A deferment; and asked the clerk to do what was necessary to see that his classification was reconsidered (A. 31).

On July 17, 1967, petitioner was ordered to report for induction on August 17 (A. 32). On July 20, 1967, he wrote the local board that he had been advised by counsel that the order to report for induction was invalid because he had had a timely appeal outstanding since May 23. He requested that the induction order be canceled, that the appeal be forwarded to the appeal board, and that he be granted a personal appearance (A. 33–34). On the same date, at petitioner's request (see A. 32), the Director of Field Operations of Appalachian Volunteers wrote the local board to inquire whether the issuance of the induction notice had been an oversight on the board's part. He noted that petitioner had been working for the organization for a year and a half, said that the work he was doing was of vital importance and that his replacement would be difficult, and expressed the hope that the board would give favorable consideration to the request for a continuation of petitioner's deferment (A. 34–35).

The board denied petitioner's request for a personal appearance since it had not been made within 30 days

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after the notification to him of his I–A reclassification, as required by 32 C.F.R. 1624.1(a) (A. 5). However, on July 25, 1967, although petitioner's time within which to appeal had expired, the local board, because of the apparent misunderstanding as to whether petitioner had intended his May 19 letter to be a notice of appeal or simply a request for local board reconsideration, cancelled the order to report for induction and forwarded petitioner's file to the appeal board (A. 35–36).[3] On August 16, 1967, the appeal board, by a 5–0 vote, rejected petitioner's request for continuation of his deferment and also classified him I–A. On August 28, petitioner and his employer were advised by the local board of this action (A. 14; G. Ex. 1).

On September 2, 1967, petitioner advised the local board by letter that he had been arrested on August 12 by officers of Pike County, Kentucky, and charged with sedition against the State of Kentucky; that the case was then pending in the United States District Court for the Eastern District of Kentucky, at Lexington (in a proceeding before a three-judge court to enjoin the State prosecution, see Pet. Br. 4 and *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.)); and that he would keep the board informed of developments (A. 37). On September 21, 1967, petitioner was again ordered to report for induction, on October 16, 1967 (A. 14). On October 9, 1967, petitioner advised

[3] The clerk, in advising petitioner of the board's actions, said that the issuance of the order to report for induction had not been an oversight. She explained that she had been instructed by the board to issue the order so that there would be no question of his having been skipped over (A. 36).

the local board and the State Selective Service Director that his "legal complications" had not been resolved; that he was "still under $5,000 bond" to the federal court; that the decision of the federal court (invalidating the Kentucky sedition statute and enjoining the State prosecution, see *McSurely* v. *Ratliff*, *supra*[4]) might be appealed to this Court, in which event the case could "drag on for several more months"; and that, in addition, he was under bond in the amount of $250 to a State court in Pike County on a still-pending charge relating to a deadly weapon. Stating that he had been advised that he could not be ordered to report for induction while he had a court case pending, he asked the board to cancel the September 21 induction order (A. 38–39). On October 12, 1967, at the suggestion of the State Director, the local board cancelled the induction order and advised petitioner that since he was "under the jurisdiction of the Court" he would be considered for a IV–F classification (A. 39–40).

2. On October 17, 1967, petitioner advised the local board that after much thought he had come to the conclusion that he was a conscientious objector and asked the board to send him the special form for claiming that status (A. 41–42). The clerk routinely sent him the Special Form for Conscientious Objector (SSS

[4] The order of the court had apparently been entered September 14, 1967 (see 282 F. Supp. at 851). The opinion and a dissenting opinion were filed subsequently, on October 18 and 20, respectively (*id.* at 848). The decision was not appealed. A related facet of the proceeding (involving a request for the return of seized documents) was before this Court in *McSurely* v. *Ratliff*, 389 U.S. 949, 390 U.S. 412, 390 U.S. 914.

Form 150) (Civ. Tr. 57–58), and he completed and returned it on October 30 (A. 14–23).

Petitioner stated in the form that he was conscientiously opposed by reason of religious training and belief to participation in war in any form (A. 15; G. Ex. 1). He said that he believed in a Supreme Being; that the belief involved duties superior to those arising from any human relation; that his religious training had taught him that it was against God's law to kill; and that he believed in Jesus' message of love for all mankind (A. 15, 19). In response to the inquiry as to how, when, and from whom he had received the training and acquired the belief upon which his claim was founded, he said that he had been born and reared a Catholic, and that in the eighth grade he had decided to become a priest, but that while in high school he had decided to wait because, though knowledgeable in the teachings of Christ, he was still ignorant as to their real significance and felt that he needed more experience. Petitioner further stated that he had gone through a religious crisis in college in which he had fancied himself an agnostic and an atheist, but that he had returned to the Catholic Church and had discovered and been much influenced by the writings of Thomas Merton. Merton was non-violent, petitioner said, but while Merton was also a contemplative, petitioner felt drawn to a more active life, in which he could work with people and help right the injustices of the world. Having become involved with the Appalachian Volunteers at about this time, petitioner's response continued, he threw himself into his work with "missionary zeal." As he grew and participated in the

world, he revalued what he had learned as a child. He said that he now placed love of his fellow man above regular church attendance. He had learned in his work of the significance of love and understanding and the futility of violence; that too many poor people had been "used and walked on by the power hungry courthouse gangs"; that there was an urgent need for the poor to become organized and for the rich to be educated; and that this must be done in a non-violent way. Although as a young man he had not been taught to oppose violence as such, he said, he had been taught not to kill and to love all men. "This coupled with my adult experience," he concluded, "has brought me to my present position. It was only through and after my adult experience that I became a CO" (A. 16, 19–22).

In response to the form's inquiry as to the circumstances, if any, under which he believed in the use of force, petitioner said that he believed "in the force of non-violence." Asked to describe the actions and behavior in his life which in his opinion most conspicuously demonstrated the consistency and depth of his religious convictions, he wrote that he was spending his life non-violently working among the poor; that he had once successfully urged non-violent methods while helping to organize resistance to strip mining, and that as a consequence of that appeal bloodshed had been averted in a tense situation; that he had supported peace demonstrations to end the Vietnam conflict; and that he had written letters to his Senators and signed a petition to the President urging a negotiated peace

in Vietnam. In reply to an inquiry as to when and where, if at all, he had given public expression to the views relied upon as the basis of his claim to being a conscientious objector, he said that he had trained groups of VISTA volunteers for work in Appalachian communities, and that he had on several occasions told such groups that non-violent change was what was needed in eastern Kentucky. He further stated that he had led discussions concerning non-violent organizing techniques and had given his views on the subject privately to friends, and that he had stated under oath in the federal proceeding arising out of the sedition charges that he did not advocate the violent overthrow of any government (A. 16, 22). Asked to describe carefully the creed or official statements of the religious sect to which he belonged in relation to participation in war, he wrote that Pope Paul had said before the United Nations: "No more war, no never again. If you wish to be brothers let the weapons fall from your hands" (A. 17).[5]

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[5] What the Pope said, in relevant part, according to the official English translation, was (New York Times, October 6, 1965, p. 6, cols. 3–5):

> * * * It suffices to remember that the blood of millions of men, that numberless and unheard of sufferings, useless slaughter, and frightful ruin, are the sanction of the pact which unites you, with an oath which must change the future history of the world: No more war, never again war. * * *
>
> * * * * *
>
> If you wish to be brothers, drop your weapons. One cannot love with offensive weapons in hand. * * * As long as man remains that weak, changeable and even wicked being that he often shows himself to be, defensive arms will, un-

Reverend William F. Browne, Catholic pastor of a church to which petitioner said he was spiritually close, and whose name petitioner submitted to the board as one who could give information as to the sincerity of petitioner's professed convictions against participation in war (A. 17, 18), advised the board by letter that he could attest to petitioner's moral integrity and veracity, and that because petitioner's "personal conscience finds that participation in war is incompatible with his moral convictions, * * * military service would do violence to his conscience." Reverend Browne wrote that the Catholic Church had always maintained that participation in a just war is morally defensible, but that moral theologians and the Church had at the same time insisted that each individual must follow his own conscience. In view of the Church's defense of the inviolability of the individual's conscience, he asked that petitioner's request to be classified as a conscientious objector be granted (A. 51–52).

Thorsten Horton, a friend of petitioner who had directed a field study project in which petitioner had participated, and whose name petitioner also gave the board as one who could vouch for the sincerity of his convictions (A. 18), wrote to the board that he had observed in petitioner "genuine Christian love" and "concern for the Christian brotherhood of Man," and that in his estimation petitioner could not have en-

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fortunately, be necessary. You, however, in your courage and valor, are studying the ways of guaranteeing the security of international life without recourse to arms. That is an aim worthy of your efforts * * *.

dured the persecution he had received arising out of his recent court experience in the sedition proceedings if he had not had faith in the goodness of man. Mr. Horton said that in a recent encounter between a coal company and an organization called the Appalachian Group to Save the Land and People, petitioner had demonstrated his belief in non-violence by persuading members of the group to leave their arms at home, thus averting what could have been a terrible waste of human life (A. 49–50).

Carl Braden, another friend of petitioner (A. 18), advised the board by letter that petitioner was a conscientious young man who was working hard to help bring about a better world for poor people. Mr. Braden said that petitioner had told him many times of his dedication to the view that peaceful action was the way to solve our problems and that war only makes the problems worse (A. 43–44).

Edith Easterling, a co-employee of petitioner's, wrote the board that she and petitioner had been working together for nearly two years trying to "bring democracy" to eastern Kentucky, and that petitioner had played an important part in the struggle and would be impossible to replace if he had to leave. Miss Easterling wrote that she had often talked to petitioner about violence in this country and that she knew him to be a peaceful person. She confirmed that petitioner had cautioned against the use of violence in the incident involving strip mining to which he referred in his Form 150 (A. 53).

Robert Mulloy, petitioner's brother, wrote to the board that while he vehemently disagreed with peti-

tioner's unwillingness to bear arms, he believed petitioner was sincere in his feelings, and noted that petitioner had maintained this position for a number of years (A. 54).

3. In his letter transmitting the completed Form 150 to the board, petitioner advised that he had been informed by his lawyer that he was "still under bond to the Federal Court" and he requested "a personal interview * * * to discuss my appalachian [*sic*]" (A. 47). The clerk replied that although the time within which to request a personal appearance as of right had lapsed, the board had decided to grant him a personal appearance, on November 9, 1967, as a matter of "courtesy" (A. 48).[6]

On November 9, 1967, petitioner appeared before the board for the courtesy interview and the board received and placed in the file the letters submitted in support of his request for conscientious objector status (A. 43–44, 49–57). The interview lasted ten or 15 minutes and was attended by three of the board's four members—Chairman J. Allen Sherman and Members Frank Wolking and Robert Downes (A. 56,

[6] Although petitioner's time within which to secure a personal appearance as of right, under 32 C.F.R. 1624.1(a), had expired, authority for the granting of a "courtesy" appearance is to be found, as the court of appeals noted (A. 5–6), in 32 C.F.R. 1625.1(c), under which local boards are directed to "keep informed of the status of classified registrants" and are authorized to question registrants and take "other steps" to that end. As explained by the chairman of the board, a courtesy hearing is in the nature of "an accommodation" to a registrant whose time for an appearance as of right has expired, made "in an effort to lean over backwards" to ensure that the registrant be given every opportunity to express himself (Civ. Tr. 34–35; cf. Tr. 130–131).

66, 76–77, 81–82).[7] During the interview petitioner was given complete freedom to express himself as to why in his opinion he ought not to be drafted (A. 66–67, 77; Tr. 156–157, 162–163). His principal statement, according to the recollection of Chairman Sherman, "was in relation to his work and the importance of his work in the mountains of Eastern Kentucky" (A. 67). He presented, Sherman recalled, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration" (A. 69). Sherman further stated, "Principally it was the same deal, that he was seeking occupational deferment" (A. 68). Member Wolking's "only recollection" of petitioner's remarks was, similarly, that he "felt like his work in Appalachia was very important and was at least important to him and he felt like he * * * should have Conscientious Objector status because of that * * *" (A. 83).[8] At the conclusion of petitioner's

[7] Member Robert Rickert, although he later participated in the decision not to reopen petitioner's classification, was not present at the November 9 meeting (A. 87–88).

[8] Petitioner testified that the atmosphere at the interview was polite but tense; that there were "hard stares" from the members; and that he was asked "belligerent" questions, including whether he was claiming to be a conscientious objector "just * * * to get out of the draft" and whether he felt any obligation to serve his country. Petitioner said he answered "no" to the first question and, to the second, that he felt he was already serving his country in the work he was doing in eastern Kentucky. He testified that after he had explained the development of his conscientious objector beliefs he was asked if he felt that his work was important; that he answered that he thought so; and that, in reply to an inquiry by a member as to

statement the chairman asked him if there was anything he cared to add and, when petitioner indicated there was not, the interview terminated (A. 67; Tr. 156–157, 162–163).

A résumé of petitioner's statement, prepared by the clerk and placed in his file, states that petitioner "advised that he was claiming a C.O. classification because he had learned through experience and did not until later in life realize the importance of now believing as he did," and that he "felt that military service would interrupt his work and there would be no one else to take his place" (A. 56). The résumé further indicates that petitioner advised the board that he would remain under bond to the federal court as long as the time for appeal in the case arising out of the sedition charges was running, and that the clerk was instructed to write to the federal court to inquire about the appeal and the bond. Until a reply was received the board "would not consider him as a C.O." (A. 56–57). The minute entry in petitioner's file re-

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whether he could be replaced, he said that that would be difficult due to the nature of his work (Tr. 154–156).

Chairman Sherman testified that few if any questions were asked at the interview and that he did not recall what the questions were, but that he was sure petitioner was not asked if he had filed the C.O. claim just to get out of the draft or if he felt any obligation to serve his country (A. 67–68; Tr. 178). Member Downes did not recall either of those questions being asked, did not remember asking any questions himself, and had the impression that petitioner "did all of the talking" (A. 77; Tr. 99–100). Member Wolking, the only other member present, did not remember asking any questions himself, and had no recollection of any other member doing so (A. 82).

flecting the action taken at the November 9 meeting states that his "classification was not re-opened" (A. 14).

Chairman Sherman testified that after petitioner had absented himself following the interview the three members present discussed the case for eight or ten minutes and came to the unanimous conclusion that there was no basis or justification for reopening his classification (A. 67, 68–69; Civ. Tr. 48). No formal vote was taken at that time, however, because according to Sherman's understanding the time for taking an appeal in the federal proceeding arising out of the State sedition charges had not yet run. It was therefore decided to hold the matter in abeyance pending the outcome or clarification of those proceedings (A. 70; Civ. Tr. 45–47, 49–50, 56, 58–59; Tr. 126).

4. On November 14, 1967, petitioner wrote to the board (A. 58–60)[9]:

> I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.
>
> These are certainly troubled times in this country. * * * I believe that another revolution is beginning to take place in this country, that this country's government can no longer deal with its internal problems.

[9] The printed copy of this letter that appears in the Appendix is incorrectly dated November 12, 1967 (A. 58). The correct date is November 14, as indicated (G. Ex. 1). The opinion below, after correctly noting that the letter was received by the board on November 17, 1967 (A. 6), later inadvertently refers to it as dated that day (A. 10). Although the date of the letter is inconsequential, these discrepancies are noted to prevent any possible confusion.

I of course hope that this revolution takes a non-violent form. It is important that men begin now to understand each other. That is why I hope that you understand me. You have me over the barrel, so to speak, in that you have the law behind you. But I remind you that I am an organizer. That I have dedicated my life to change and to the constant struggle that is democracy. There is nothing that can stop me from organizing against something I don't believe.

This brings us to the war in Vietnam and my draft situation. I do not question individual integrety [*sic*] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.

I told you I felt that I was serving my country's needs here in Pike County. That was no frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must

> do this to bear witness to my beliefs and to cause my fellow citizens to think.
>
> I know that I will eventually face prison. I am not afraid of that. Greater men than I have pulled time for practicing what they believe. * * *

On December 2, 1967, petitioner advised the board by letter that he had been "fired" by Appalachian Volunteers for claiming conscientious objector status and for stating that he would refuse induction if ordered. He said that he felt badly about being released from his job, but that a person must have the "conviction of his beliefs," and he asked the board to consider his loss of employment as a public demonstration of his C.O. convictions. He further advised that so far as he knew he was still under bond to the federal court (A. 61).

On December 6, 1967, the local board received a letter dated October 26 from the clerk of the federal district court to the Kentucky State Selective Service Headquarters, advising that petitioner had recently been a plaintiff in an action on the court's civil docket, but that so far as the clerk knew he had never been a defendant in any case in that court, civil or criminal (A. 46).[10] On January 3, 1968, petitioner advised the

[10] The letter was a reply to an inquiry made by State Headquarters on October 24 as to whether petitioner was still under the jurisdiction of the court. The inquiry had noted that petitioner, a registrant subject to induction, could not be inducted while he was under the court's jurisdiction (A. 45). A like inquiry, which referred to petitioner's October 9 statement that he was under bond to the Pike County Court in connection with a charge of flourishing a deadly weapon, had been addressed to that court (A. 44-45). It does not appear what response, if any, was made to that inquiry.

local board that the sedition charge against him had been dropped and the bond involved in that case released; he said he was unsure about the Pike County bond but that he thought it had been dropped, and that he was awaiting word from his lawyer on that charge (A. 62).

On January 11, 1968, the local board, after considering "[a]ll information in file * * * including [the] claim of Conscientious Objector" status, voted 4–0 not to reopen petitioner's classification. "All Members present," according to the minute entry of the board's action, "felt this information did not warrant re-opening" of the I–A classification (A. 14). Board Member Rickert, who had not attended the November 9 courtesy interview, participated in the decision after reviewing petitioner's file and discussing the matter with the other members (A. 87–88). On January 21, 1968, following notification of the board's action (A. 63), petitioner wrote to the board: "I appeal your failure to reclassify me I–O. I consider the interview in November a re-opening of my case" (A. 64). On January 23, 1968, the board replied that the November appearance had been granted merely as a matter of courtesy, since petitioner's time for requesting a personal appearance as of right had expired, and that the board did not consider the interview to constitute a reopening of his classification (A. 65). On the same day, petitioner was ordered to report for induction on February 23, 1968. Petitioner reported as directed, but refused to submit to induction (A. 14).

5. At trial petitioner called all of the members of the local board as witnesses and cross-examined each

as to the basis of the board's decision not to reopen his classification (A. 66–72, 74–91). Chairman Sherman testified in relevant part (A. 71–72):

> Q. Is it your position that the statements that Mr. Mulloy made in SS Form 150 and the statements that he made on the interview and the supporting letters that were sent, even if true, would not justify a reopening of his classification?
>
> A. Taking everything that he—he did not make out—his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.
>
> Now, I went over his 150 Form. What's in it, now, I couldn't tell you. * * * His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.
>
> * * * * *
>
> Q. Is it your position that on all the information that you have, that is, his testimony at the hearing, his answers on SS Form 150 and other information in his file, this did not make out a case that he was entitled to a deferment?
>
> A. Well, I think the file speaks for itself. The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished to us, the letters he had sent in with his 150 Form and the information that he had given when he appeared in person.

Member Wolking said that the board assumed petitioner was sincere, but nonetheless felt that the evi-

dence did not warrant reopening because his claim to C.O. status was based essentially on the importance of his work (A. 83, 84, 86). Wolking testified (A. 84, 86):

> Q. And [are you prepared to state under oath] that everything he said and all of the evidence he produced even if true, would not entitle him to the classification that he claimed?
>
> A. That is the way I felt and that is the way I voted.
>
> * * * * *
>
> Q. As I understand it then, you did not inquire into his sincerety [*sic*], but the prima facie case that he presented?
>
> A. That is quite true.
>
> Q. Assuming that he was sincere?
>
> A. We assumed he was sincere, that's right.
>
> Q. You stated that he talked about or based his claim on the importance of his work in Appalachia?
>
> A. That is the impression I have or that is the impression I remember.
>
> Q. He was asking for a Conscientious Objector status because he had important work in East Kentucky?
>
> A. That's right.
>
> * * * * *
>
> THE WITNESS: I mean everything that was in the Form 150 and, everything he said, in other words, everything was taken into consideration in the record and that's what my decision was based on.
>
> Q. And that even—in other words, you did not question his sincerity, I take it?
>
> A. That is correct.

The other board members, Downes and Rickert, were not questioned as to whether they regarded or assumed all of petitioner's statements to the board to be true, or his claim a sincere one, and they gave no testimony pertinent to those points.

All four members testified that they felt they had given full, fair, and unbiased consideration to petitioner's case (Tr. 110, 115–116, 128–129, 132–133, 144–145, 178).

SUMMARY OF ARGUMENT

I

The local board properly refused to reopen petitioner's classification.

A. 32 C.F.R. 1625.2 provides that a local board may reopen a classification where new facts are alleged which, if true, would justify a change in the registrant's classification. In contrast to the explicitly mandatory nature of several of the companion provisions, this section of the regulations gives discretion to the board whether to reopen in those circumstances. It is necessary to the effective operation of the Selective Service System for local boards to have discretion whether to reopen in such a situation; indeed, if the boards were required, as petitioner contends, to reopen whenever what might be termed a *prima facie* case for reclassification was presented, registrants could interminably delay their induction merely by filing successive claims for exempt or deferred status and alleging the necessary facts to support each claim, regardless of how inherently suspect those facts were.

Where a request to reopen is accompanied by allegations of new facts which, if true, would justify a change of classification, and the board has no reason to question the truth or sincerity of the representations, refusal to reopen would be unreasonable and hence an abuse of discretion. But where, as in this case, the board has compelling reasons for doubting the veracity or sincerity of the allegations, it need not automatically reopen. Acting under the investigative powers granted by 32 C.F.R. 1625.1(c), it can scrutinize the representations and inquire further. And if the board's scrutiny of the representations is to be consistent with 32 C.F.R. 1625.2, it must be accomplished as part of the process of determining whether to reopen. If the board must reopen *in order to* scrutinize, the discretion which the regulations gives is illusory and a registrant can compel reopening (with its concomitant opportunities for appearance and appeal—and thus substantial delay) simply by making the necessary allegations.

In this case the board had ample reason to question the truth of petitioner's allegations relating to his religious beliefs. The timing of petitioner's claim gave rise to an understandable concern that it might be merely a delaying tactic. Furthermore, petitioner's Form 150 and several of his reference letters focused repeatedly on petitioner's work in Appalachia; this understandably led the board to wonder whether petitioner's belated claim to C.O. status was merely an attempt to reopen the issue of the relevance of his work in Appalachia to his draft status. Petitioner's presentation at the courtesy interview provided by the

board caused the board to have even greater doubts as to the depth of his claimed C.O. convictions and the nature of their alleged religious basis, for, once again, petitioner neglected the relevant question of religious beliefs and centered his argument around the importance of his work in Appalachia. Against this background, the board could properly consider the representations made in the Form 150 in the light of these substantially contemporaneous statements, and conclude that no credible *prima facie* case of entitlement to C.O status had been presented.

Our view of 32 C.F.R. 1625.2 does not obliterate the distinction between a refusal to reopen and a denial of a requested classification after reopening. Petitioner's contention that it does erroneously assumes that the classification process consists merely of inquiring into the truth or falsity of the facts stated by the registrant. Normally, however, classification requires the local board, after it has determined the facts, to evaluate them and determine what weight to assign to various elements in the registrant's situation. Our interpretation leaves ample room for a procedure whereby a classification is reopened for the purpose of considering and evaluating new facts, but where the registrant, after reconsideration, is given the same classification he previously had—without any implication that the facts stated in the reclassification request were untrue. Indeed, the board's approach here of granting petitioner a "courtesy interview" introduces a desirable amount of flexibility into the system that the rigid rule petitioner proposes would prevent.

B. The board did not assume that petitioner was sincere in his claim to be a conscientious objector. Member Wolking's statement that the board assumed petitioner's sincerity, read in the light of the witness' other testimony, must be taken to have meant only that the board assumed petitioner was sincere in his remarks at the courtesy interview about the importance of his work in Appalachia. Indeed, if the members assumed petitioner was sincere in his claim to be a C.O., it would have been inexplicable for them to have voted not to reopen.

C. There is no merit to petitioner's contention that since a registrant whose claim to be a conscientious objector is denied at the time of his original classification is entitled as of right to take an administrative appeal, and since a registrant whose claim is denied following reopening and reconsideration of an existing classification can similarly appeal as of right from the board's decision on the merits, it is impermissibly discriminatory to refuse the right of appeal to one who, like petitioner, is denied reopening because he has failed to present a credible *prima facie* case of entitlement to that status. It is not unreasonable to require that a registrant who first advances a claim to conscientious objector status after he is originally classified make a credible *prima facie* showing that he has a right to that classification before the rights to a personal appearance and an administrative appeal, with their attendant delays, should accrue.

II

The local board considered petitioner's request for conscientious objector status fairly and competently.

A. All members of the board read petitioner's representations in the Form 150 prior to the taking of the vote not to reopen and all testified that they felt they had given full, fair, and unbiased consideration to his case. Petitioner's speculations as to the degree of care with which the members read the statements in the form raise no issue of constitutional magnitude.

B. None of the instances cited by petitioner of alleged lack of comprehension of the applicable law on the part of the board members is substantial. In any event, there is no basis for petitioner's claim that the board as a body exhibited such misunderstanding of the law as to suggest that it lacked competence to pass intelligently on his C.O. claim.

ARGUMENT

I. THE LOCAL BOARD PROPERLY REFUSED TO REOPEN PETITIONER'S CLASSIFICATION

A. WHETHER TO REOPEN IS DISCRETIONARY UNDER THE REGULATIONS, EVEN WHERE THE NEW FACTS ALLEGED WOULD, IF TRUE, JUSTIFY A CHANGE OF CLASSIFICATION

32 C.F.R. 1625.2 provides that a local board "may reopen and consider anew the classification of a registrant," upon his written request, if the request "is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification," even after an induction order has been issued to the registrant.[11] If the board re-

[11] In the latter circumstance, a proviso precludes reopening "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which

opens, it is directed to consider the new information and to classify the registrant again, "in the same manner as if he had never been classified"; similarly, the registrant has the same right to appear personally before the board and to appeal administratively, as in the case of an original classification, even though he is given the same classification he had before the reopening (32 C.F.R. 1625.11, 1625.13). If the board feels that the information accompanying the request fails to present any facts not considered when the registrant was classified, or that the new facts, if true, would not justify a change of classification, the board "shall not reopen the registrant's classification" (32 C.F.R. 1625.4). In such a situation, there is no right of personal appearance or of administrative appeal. The board in that event merely advises the registrant by letter that the submitted information does not warrant reopening and places a copy of such letter in his file (*ibid.*).

Petitioner contends that the new information which he presented to the local board along with his request that his classification be reopened, consisting of the representations made in his completed SSS Form 150

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the registrant had no control." Cf. *DuVernay* v. *United States*, 394 F. 2d 979 (C.A. 5), affirmed by an equally divided Court, 394 U.S. 309. It should be noted that the regulation also authorizes reopening and reconsideration on the board's "own motion" if the action is similarly based upon previously unconsidered relevant facts.

and in the accompanying letters, constituted a *prima facie* showing that he was entitled to conscientious objector status, *i.e.*, a showing of facts not previously considered which, if true, would justify his reclassification to I–O; that the board was therefore required to reopen his classification, evaluate the new information, and reclassify him (to I–O or again in I–A); and that, by refusing to reopen, the board improperly precluded him from taking an administrative appeal—a procedural right to which he was entitled. Alternatively, he argues, the board by its actions did in fact reopen, evaluated the new information, and again classified him I–A. Whichever course the board is deemed to have followed, he says, he was improperly prevented from having his C.O. claim considered by an appeal board (Pet. Br. 11–29). He relies on the principle of cases such as *United States* v. *Freeman,* 388 F. 2d 246 (C.A. 7), *Miller* v. *United States,* 388 F. 2d 973 (C.A. 9), and *Davis* v. *United States,* 410 F. 2d 89 (C.A. 8), that a request to reopen can properly be denied only where the new information tendered is insufficient on its face to justify a change in classification, and that a board may not, under the guise of refusing to reopen, evaluatively weigh the new information "against other elements in the situation" (*Miller* v. *United States, supra,* 388 F. 2d at 975), and on the basis of that appraisal determine that reopening would be inappropriate.

It is assumed herein that, despite the rather vague character of the asserted religious basis of petitioner's claimed conscientious objection to participation in war in any form, the new information he presented in the

representations contained in the Form 150 and in the accompanying letters (*supra,* pp. 8–13) did constitute a *prima facie* showing that he met the statutory standard for C.O. status (50 U.S.C. App. (Supp. IV) 456(j)). Cf. *Davis* v. *United States, supra,* 410 F. 2d at 94–95, n. 4; *Vaughn* v. *United States,* 404 F. 2d 586, 594–595 (C.A. 8) (dissent). It is our position, nevertheless, that the board was not automatically required, under the pertinent regulations, to reopen petitioner's classification on the basis of the showing he made, and that, in the circuumstances of this case, the board was amply justified in declining to do so.

1. As noted above, 32 C.F.R. 1625.2 provides that the local board *may* reopen a classification in the circumstances defined (*i.e.,* where the alleged new facts would justify reclassification if true). The permissive language of this section of the regulations contrasts sharply with the mandatory language of several of the companion provisions. For example, the following section, 32 C.F.R. 1625.3, provides that "[t]he local board *shall* reopen * * * upon the written request of the State Director of Selective Service * * *" (emphasis added). Similarly, and as previously noted, if the board determines that the newly alleged facts, if true, would *not* justify a change of classification (or that no new facts are presented), it is *prohibited* ("shall not") from reopening (32 C.F.R. 1625.4).[12] Thus, as the court below observed (A. 8) and as was emphasized in

[12] Compare also the prohibitory language of the proviso to 32 C.F.R. 1625.2 itself (referred to in note 11, *supra*) (forbidding reopening, except in the circumstances indicated, after the registrant has been ordered to report for induction).

Robertson v. *United States*, 417 F. 2d 440, 446–447 (C.A. 5), Section 1625.2 gives *discretion* to the board to reopen in the circumstances stated—it does not *require* it to do so. Such discretion, like any legally conferred discretion, may not, of course, be exercised arbitrarily. Cf. *United States* v. *Grier*, 415 F. 2d 1098, 1100–1101 (C.A. 4); *Townsend* v. *Zimmerman*, 237 F. 2d 376, 377 (C.A. 6); *Stain* v. *United States*, 235 F. 2d 339, 342–343 (C.A. 9); *Olvera* v. *United States*, 223 F. 2d 880, 883 (C.A. 5); *United States* v. *Vincelli*, 215 F. 2d 210, 212–213 (C.A. 2); *United States* v. *Bartelt*, 200 F. 2d 385, 389 (C.A. 7); *Smith* v. *United States*, 157 F. 2d 176, 181 (C.A. 4), certiorari denied, 329 U.S. 776. But it is important to stress that the regulation simply confers authority on the board to reopen a classification; it does not command reopening even where a *prima facie* case for reclassification is stated.

Indeed, it is difficult to understand the basis of petitioner's assertion that 32 C.F.R. 1625.2 *compels* the board to reopen whenever a registrant alleges facts which would, if true, justify the registrant's claim. This is so not only because of the discretionary language of the regulation, but also because of the impossible situation that boards would face if they lacked discretion to decline to reopen in appropriate cases.[13] Under petitioner's interpretation, a registrant

[13] As petitioner acknowledges (Pet. Br. 40), due process does not require that every determination by a local board be appealable. See *United States* v. *Beaver*, 309 F. 2d 273, 277 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F. 2d 607, 611 (C.A. 9); *Klubnikin* v. *United States*, 227 F. 2d 87, 90–91 (C.A. 9), certiorari denied, 350 U.S. 975.

bent upon delay, and possessing no valid claim to exemption or deferment, could nonetheless postpone his induction indefinitely, for there would be nothing to prevent him, after unsuccessfully appealing a local board's refusal to grant one baseless request for reopening, from promptly filing another. The new request might be for the same or a different new classification, and the new facts alleged might be wholly different from or mere enlargements upon the earlier. However insincere or fictitious the board might believe the assertions to be, under petitioner's view it would be *required* to reopen so long as what might be termed a *prima facie* case [14] for reclassification was presented. Upon the board's denial of the classification sought, a new appeal would then lie to the appeal board. Thus, as the court below noted, petitioner's "contention, if upheld, would result in interminable delays in proceedings before Local Boards and indeed might frustrate the operation of the Selective Service System" (A. 9). Or, as observed in *United States ex rel. La Charity* v. *Commanding Officer*, 142 F. 2d 381, 382 (C.A. 2), "[I]f there were an appeal from every refusal to change a classification, a registrant could interminably delay his induction by successive requests and appeals * * *." [15] The likelihood of abuse under this interpre-

[14] Just what is meant by a "*prima facie* case" in these circumstances is less than clear. It presumably refers to a sufficient showing of entitlement to reclassification so that, absent any pertinent evidence to the contrary then in the possession of the board, an evaluative consideration of the claim made is required (see *infra*, pp. 32–36).

[15] Cf. *United States ex rel. Filomio* v. *Powell*, 38 F. Supp. 183, 188 (D.N.J.), where the court stated: "The effect of providing for appeals from refusals to re-classify would be to open

tation would be particularly acute in a case where, as here, the registrant is close to the maximum age for induction, so that the delays resulting from the reopening procedures could conceivably allow the registrant to escape induction altogether, regardless of whether his claim for exempt or deferred status is upheld on appeal. Moreover, a logical corollary to petitioner's position is that a board would be required to reopen a registrant's classification, upon a *prima facie* showing of entitlement to reclassification, even *after* an induction order had been issued.[16] Were that the rule, the potential for disruption of the effective operation of the system would be further increased; indeed, a local board would never be in a position to know whether it would be able to meet its quota of inductees.

2. The courts have recognized, in a variety of contexts, that the authority conferred by 32 C.F.R. 1625.2 is discretionary in nature. In *United States* v. *Ransom*, 223 F. 2d 15, 18–19 (C.A. 7), the court noted that "even when a registrant has alleged facts which, if true, would entitle him to the requested classification, further investigation may not be necessary because a

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the door to innumerable appeals sufficient, perhaps, to 'bottleneck' the entire system of Selective Service."

[16] Of course, under Section 1625.2, a board is not to reopen "unless * * * [it] first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." But petitioner's position would presumably require a reopening if a *prima facie* case of entitlement to the requested classification were made out; alternatively, petitioner could argue that the board had in fact reopened in order to make the requisite finding. And, despite the language of this proviso, it is hardly a difficult matter for a registrant to assert that a change in status resulted from circumstances beyond his control.

basis for denying the classification may appear on the face of his evidence *or in the manner of its presentation*" (emphasis added). In *Woo* v. *United States*, 350 F. 2d 992 (C.A. 9), a registrant who had twice unsuccessfully claimed conscientious objector status without seeking administrative review presented to the local board, after being ordered to report for and passing his pre-induction physical examination, a third request (accompanied by newly alleged facts) which the court apparently treated as facially sufficient. Sustaining the board's refusal to reopen, the Ninth Circuit held that "a local board does not act arbitrarily and unreasonably in refusing to reconsider a claim of exempt status by a conscientious objector when the same claim has previously been considered and rejected and the registrant has not invoked the administrative remedies which would have brought about a thorough investigation and hearing of all aspects of his claim" (350 F. 2d at 995-996).[17] And in *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D. N.Y.), the court defined a *prima facie* case, in the context of the regulation here involved, as one presenting facts which, "if true *and uncontradicted by other information contained in his* [the registrant's] *file*," would suffice to warrant the requested classification (emphasis added). The qualification that the facts presented must not be contradicted by other known information

[17] Of course the instant case differs from *Woo* in that the claim to C.O. status involved here was petitioner's first. The *Woo* decision is nonetheless illustrative of the fundamental point that a request to reopen which presents a *prima facie* case for reclassification need not automatically be granted.

refutes the notion, on which petitioner's case essentially rests, that the local board, in determining whether a proper case for reopening has been presented, may not look beyond the four corners of the request and accompanying documents. See also *Parrott* v. *United States*, 370 F. 2d 388, 394–395 (C.A. 9), certiorari denied *sub. nom. Lawrence* v. *United States*, 387 U.S. 908; *United States* v. *Gearey*, 379 F. 2d 915, 922, n. 11 (C.A. 2).[18]

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[18] In accordance with the principle that the *classification* given a registrant by the board may not be judicially overturned if it has a "basis in fact" (*e.g.*, *Estep* v. *United States*, 327 U.S. 114, 122–123; *Dickinson* v. *United States*, 346 U.S. 389, 394; *Witmer* v. *United States*, 348 U.S. 375, 380–381; *McKart* v. *United States*, 395 U.S. 185, 196; see 50 U.S.C. App. (Supp. IV) 460(b)(3)), the courts have frequently stated that refusal to reopen a classification is improper only if there is no basis in fact for the refusal. *United States* v. *Grier*, 415 F. 2d 1098, 1100–1101 (C.A. 4); *Petrie* v. *United States*, 407 F. 2d 267, 272–273 (C.A. 9); *Vaughn* v. *United States*, 404 F. 2d 586, 591 (C.A. 8); *Robertson* v. *United States*, 404 F. 2d 1141, 1146 (C.A. 5), reversed on other grounds, 417 F. 2d 440 (*en banc*); *Woo* v. *United States*, 350 F. 2d 992, 996–997 (C.A. 9) (Hamley, J., dissenting on other grounds); *Stain* v. *United States*, 235 F. 2d 339, 343 (C.A. 9); *United States* v. *Ransom*, 223 F. 2d 15, 17 (C.A. 7); *United States* v. *Davis*, 284 F. Supp. 93, 99 (S.D. Iowa), reversed on other grounds, 410 F. 2d 89 (C.A. 8); *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D. N.Y.); *United States* v. *Majher*, 250 F. Supp. 106, 110 (S.D. W. Va.). As observed in *Petrie* v. *United States*, *supra*, 407 F. 2d at 272–273, "While in most cases the 'basis in fact' test is applied to the final classification action of the local board, it is equally applicable to a refusal by the board to reopen the registrant's classification." Or, as noted in *United States* v. *Burlich*, *supra*, 257 F. Supp. at 911, the rule requiring a basis in fact for the board's original classificaton "is equally applicable to the action of the Board in determining whether or not changed conditions justify a reopening * * *."

Where a request to reopen is accompanied by allegations of new facts which, if true, would justify a change of classification, and the board has neither any reason to question the truth or sincerity of the representations nor other information available to it strongly supporting the existing classification, reopening concededly is required. Refusal to reopen in those circumstances would be unreasonable and hence an abuse of discretion on the board's part. That was the situation in a number of the cases cited by petitioner and, as well, in the great majority of the cases in which local boards have been held to have erred in refusing to reopen. *E.g.*, *Howse* v. *United States*, 409 F. 2d 27 (C.A. 9); *Petrie* v. *United States*, 407 F. 2d 267 (C.A. 9); *Robertson* v. *United States*, 404 F. 2d 1141 (C.A. 5), reversed on other grounds, 417 F. 2d 440 (*en banc*); *Olvera* v. *United States*, 223 F. 2d 880 (C.A. 5); *United States* v. *Ransom*, 223 F. 2d 15 (C.A. 7); *Brown* v. *United States*, 216 F. 2d 258 (C.A. 9); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3); *United States* v. *Burlich*, 257 F. Supp. 906 (S.D. N.Y.); *United States* v. *Majher*, 250 F. Supp. 106 (S.D. W.Va.); *United States* v. *Scott*, 137 F. Supp. 449 (E.D. Wis.). But where, as in this case, the board has compelling reasons for questioning the veracity or sincerity of the allegations, it need not mechanically reopen. Acting under the investigative powers granted by 32 C.F.R. 1625.1(c), the board, as the court below noted (A. 9), can scrutinize the new representations made to it and can inquire further regarding them. And if the board's scrutiny of the representations is to be consistent with 32 C.F.R. 1625.2, it

must be accomplished as part of the process of determining whether it would be proper to reopen—both where an induction order is extant [19] and where, as here, the registrant is simply classified I–A. For if the board must reopen *in order to* scrutinize—if it may not inquire into or consider the truthfulness of the representations *until* it reopens or if, as petitioner alternatively contends, this inquiry itself constitutes a reopening—the discretion which the regulation gives to the board is illusory, and boards would be deprived of desirable flexibility in this regard. And, if petitioner's suggested approach were approved, a registrant could compel reopening (with its attendant delay) simply by making the necessary allegations, however inherently suspect.

3. In the instant case, the board had ample reason to question the truth of petitioner's allegations relating to his religious beliefs. To begin with, the timing of petitioner's claim gave rise to an understandable concern that it might be merely a delaying tactic. As the court observed in *Salamy* v. *United States*, 379 F. 2d 838, 842 (C.A. 10), "Certainly, sudden emergence of fully matured religious objections to military service, so soon after a deferment has been denied on an entirely unrelated ground, is a critical factor to consider in evaluating a registrant's sincerity."

Even more significant, however, were petitioner's repeated references in the Form 150 to his work in Appalachia (which he pointed to as the key indication of the sincerity of his religious beliefs, *supra*, p. 9)

[19] Of course, in this kind of case, a board would initially seek to determine whether there had been a change in circumstances beyond the registrant's control (see note 11, *supra*).

and the emphasis which several of petitioner's reference letters placed on this work (*supra*, pp. 11–12). These initial statements, viewed in the context of petitioner's earlier unsuccessful efforts to extend his occupational deferment, led to the board to wonder whether petitioner's belated claim to C.O. status was merely an attempt to reopen the issue of the relevance of his work in Appalachia to his draft status.

In order to subject petitioner's representations to further scrutiny, the board granted him the November 9 courtesy interview. The board wished to hear from petitioner personally concerning the depth of his claimed C.O. convictions and the nature of their alleged religious basis. Petitioner, the evidence shows, did not satisfy the board on either point. Although he was given full freedom to express himself as to why in his view he ought not to be drafted, the main thrust of his statement, according to the recollection of the chairman, concerned the importance of his work in Appalachia.[20] He presented, the chairman said, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration." In short, the chairman said, "it was the same deal, that he was seeking an occupational

[20] Petitioner's emphasis at the interview on his work is not surprising in light of the fact that in his letter to the board transmitting the completed Form 150, after mentioning that his "CO application" was enclosed, he requested an "interview * * * to discuss my appalachian" (*supra*, p. 13; A. 47). Petitioner's "appalachian", it is apparent, was his work. The letter thus provides further indication of the close association in petitioner's mind between his request for conscientious objector status and his occupational activities.

deferment" (*supra*, p. 14). Similarly, Board member Wolking's only recollection of petitioner's remarks was that he "felt like his work in Appalachia was very important" and that he "should have Conscientious Objector status because of that * * *" (*ibid.*). The clerk's résumé of the interview similarly states that petitioner "felt that military service would interrupt his work and there would be no one else to take his place" (*supra*, p. 15).

A few days later, in his letter of November 14, 1967 (*supra*, pp. 16–18), petitioner advised the board that he did not think all the relevant points had been covered at the courtesy interview and that he had not been able fully to express his position of conscience. He added nothing pertinent, however, beyond repeating his statement at the interview that he felt he was already serving his country's need for the work he was doing. His comments to the effect that the country's problems were too great to be ignored any longer, that no one should in his judgment be sent to another country while this country was in the mess it was in, and that, believing this nation's course in Vietnam to be wrong, he felt he would be serving its best interests if he followed his conscience (*supra*, p. 17) contributed nothing particularly germane. The tone of the letter, moreover, may have given the board added reason to doubt that petitioner was a genuine conscientious objector. Petitioner advised that he realized the board had him "over the barrel" in that it had the law behind it. He said he felt that the board was going to try to draft him in spite of the feelings he had expressed and that he did not doubt its sincerity or its right by law to do so.

Noting that he had not yet made up his mind whether he would submit to induction (in the event the board rejected, as he expected it to, his C.O. claim), he said that if he decided to submit he would organize resistance among his fellow soldiers and do what he could to teach them the truth about Vietnam and the principles of non-violence, and that if he decided to resist he would make "the biggest stink about it possible." He knew in any case, he said, that he would face prison and he was not afraid of the prospect (*supra*, pp. 17–18).

Against this background, the board could not only legitimately wonder whether these were the remarks, and this was the attitude, of an actual conscientious objector; it could also properly evaluate the representations made in the Form 150 in the light of these substantially contemporaneous statements, and conclude that no *prima facie* case of entitlement to C.O. status, within the meaning of the pertinent decisional law, had been presented. The board could, in other words, in determining whether a *prima facie* case had been made out so that reopening was proper, appropriately discount the written representations accompanying the request by the substantially contemporaneous statements petitioner had made at the interview and in his subsequent letter. At least to the extent that the board's refusal to reopen was based on the foregoing considerations—and the record, it is submitted, fairly reflects that they were important if not indeed the decisive grounds for the board's action—the board did not engage in such an evaluative weighing of an other-

wise sufficient *prima facie* showing as would in effect constitute a reopening of petitioner's classification.[21]

4. Our view as to the proper construction of 32 C.F.R. 1625.2 does not obliterate the distinction between a refusal to reopen and a denial of a requested classification after reopening, as petitioner asserts (Pet. Br. 12, 21–22). This contention assumes that the classification process consists merely of inquiring into the truth or falsity of the facts stated by the registrant. This is not the case. Ordinarily, in fact, classification requires the local board to assemble and evaluate all the pertinent actual facts, and to determine what weight to assign to various elements in the registrant's sometimes complex situation. For example, in processing a request for an occupational deferment, the board weighs the relative importance of the registrant's civilian work against the nation's need for his military service. Similarly, in evaluating a claim to a hardship deferment, the board judges the extent to which the claimed dependent requires the registrant's continued financial support from his civilian wages. Certainly not every request for exemption or deferment involves scrutiny of the represented facts for falsity; although this will sometimes be a

[21] Cf. *United States* v. *Hill*, 221 F. 2d 437, 441 (C.A. 7), certiorari denied, 349 U.S. 964, where, in a similar situation, the local board determined that the registrant, whose request for reopening contained representations sufficient on their face to justify the classification sought, had nonetheless failed to present a *prima facie* case for the classification because at an interview to which the board invited him he was so evasive in his answers that the board did not believe what he had written. That, essentially, was what occurred here.

factor, normally the truth of the representations is assumed. Thus, there remains ample room under our interpretation for the procedure whereby a classification is reopened for the purpose of considering and evaluating new facts, but the registrant, after reconsideration, is given the same classification he previously had—without any implication that the representations in the reclassification request were untrue. Indeed, it is important to the efficient functioning of the system for local boards to have such flexibility. Otherwise, they might well refuse to consider new information in a thoroughgoing fashion, and decline to grant courtesy interviews such as was given to petitioner. In short, both the system and individual registrants would suffer from a rigid rule that any extended consideration of newly submitted facts is tantamount to a reopening of the registrant's classification, with the procedural consequences that that entails.

B. THE BOARD DID NOT ASSUME PETITIONER WAS SINCERE IN HIS CLAIM TO BE A CONSCIENTIOUS OBJECTOR

Petitioner argues that the board accepted everything he said as true and assumed that he was sincere in his asserted religious beliefs (Pet. Br. 13–14, 26). The record, however, will not support that interpretation. The testimony on which petitioner relies (A. 71, 72, 84, 86) has been referred to previously (*supra*, pp. 20–21). To be noted, in the first place, is that only two members of the board—Chairman Sherman and Member Wolking—were questioned on the point in issue. The other members—Downes and Rickert—said nothing pertinent. When the statement of the

chairman is carefully examined, it is clear that all he relevantly meant to say was that "assuming everything that [petitioner] said down there at that time [*i.e., at the courtesy interview of November 9*] to be so, he still did not make out a case for a conscientious objection"—because "his claim [at the interview] was principally on his job, the work he was doing * * *" (*supra*, p. 20). Nothing in the chairman's testimony can be read as suggesting that he accepted the sincerity of *everything* that petitioner said, including the representations made in the Form 150. Indeed, Sherman's other testimony strongly indicates that he doubted petitioner's allegation of religiously based opposition to participation in all wars.

The chairman testified, for example, that following the courtesy interview the three members present discussed the case briefly and came to the unanimous conclusion that there was no basis or justification for reopening the classification (*supra*, p. 16). And in response to an inquiry whether the board's decision not to reopen was made on that day, he said (A. 69):

> That's right, that there was no justification, that it was the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration.[22]

Member Wolking's testimony, on which petitioner principally relies (Pet. Br. 13), is at best ambiguous.

[22] Cf. the chairman's testimony at A. 68: "We * * * listened to him [at the interview] to see if he had any merit, or any difference, or changed his position. Principally it was the same deal, that he was seeking occupational deferment from what his testimony was * * *."

In its context, we believe that his statement, "[w]e assumed he was sincere, that's right," was meant to convey no more than that the members assumed petitioner was sincere in his remarks at the interview about "the importance of his work in Appalachia" (*supra*, p. 21; A. 84). Indeed, Wolking could not have meant that he assumed petitioner was sincere in making his C.O. claim because in the witness's earlier statement he indicated precisely the opposite—that his only recollection of petitioner's remarks at the interview was that he "felt like his work in Appalachia was very important and * * * he * * * should have Conscientious Objector status because of that" (*supra*, p. 14; A. 83). Furthermore, Wolking was one of the three members who, according to the chairman, unanimously concluded following the interview that no reason for reopening had been demonstrated. The assumption, in short, that Sherman and Wolking meant to say that they regarded petitioner as sincere in his claim to being a conscientious objector is not reconcilable with their testimony viewed as a whole. Moreover, if they assumed petitioner was sincere in that representation, it would have been entirely inconsistent, and indeed inexplicable, for them to have voted not to reopen.

The courts below seem to have shared the board members' doubts as to petitioner's sincerity. Both courts indicated that in their view petitioner had presented the C.O. claim in bad faith. In sentencing petitioner the district court commented that petitioner had pretty well "worn out" his claim for C.O. status, that it had not been asserted for "many, many

months," and that in the court's judgment he had "suffered an instant conversion" when he realized that "the platoon sergeant was about to blow his whistle" (A. 12; Tr. 209). The court of appeals similarly remarked that petitioner's C.O. claim had "fooled" neither the board members nor the trial judge (A. 12).

C. THE DENIAL OF AN ADMINISTRATIVE APPEAL TO A REGISTRANT IN PETITIONER'S SITUATION IS NOT IMPERMISSIBLY DISCRIMINATORY

There is no merit in petitioner's contention that his inability to secure appeal board review of his claim to conscientious objector status resulted in invidious discrimination (Pet. Br. 39–42). Petitioner points out that a registrant whose C.O. claim is denied at the time of his original classification is entitled under the regulations to appeal administratively as of right—without regard to the merit of the claim or to whether or not a believable *prima facie* case therefor is made. He further notes that a registrant whose claim is denied following reopening and reconsideration of an existing classification can similarly appeal as of right from the board's decision on the merits (see *supra*, pp. 26–27). Thus, he concludes, it is discriminatory and a denial of due process to refuse the right of appeal to one who, like petitioner, is denied reopening because he has failed to present a credible *prima facie* case of entitlement to that status—or because the board, as here, rejects the claim as insincere following an interview.

There is nothing unreasonable, however, in requiring that a registrant who first advances a claim to conscientious objector status after he is originally classified make a credible *prima facie* showing that he

is entitled to that classification before the rights to a personal appearance and an administrative appeal, with the attendant delays, should accrue. *Boyd* v. *United States,* 269 F. 2d 607, 611 (C.A. 9); *Klubnikin* v. *United States,* 227 F. 2d 87, 90–91 (C.A. 9), certiorari denied, 350 U.S. 975; *United States ex rel. La. Charity* v. *Commanding Officer,* 142 F. 2d 381, 382 (C.A. 2). Nor is it unreasonable to permit the board, before reopening, first to satisfy itself through inquiry that the claim at least has been presented in good faith (see *supra,* pp. 32–41).[23] Nothing in *Miller* v. *United States,* 388 F. 2d 973 (C.A. 9), relied on by petitioner, is to the contrary. All that *Miller* relevantly held was that it would be impermissibly discriminatory for the regulations to be read as permitting a board to distinguish, in deciding whether to grant reopening, between "prima facie situations *of legal equality*" (emphasis added) (388 F. 2d at 976–977).[24]

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[23] Belief that the claim is in good faith is not, of course, equivalent to determining the ultimate issue of its merit. A sincere claimant to conscientious objector status may still fail to qualify under the statutory standard. Cf. *United States* v. *Seeger*, 380 U.S. 163, 166–169, 185–188.

[24] Petitioner, noting the court of appeals' comment that his November 14 letter (erroneously referred to as his letter of November 17, see note 9, *supra*) "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief" (A. 10; Pet. Br. 31), argues that the court erroneously failed to recognize that if a registrant's objection to participation in war is based partly on religious training and belief and partly on other factors he is nevertheless entitled to C.O. status (Pet. Br. 30–37). We do not dispute the proposition that a conscientious objection to military

II. THE LOCAL BOARD CONSIDERED PETITIONER'S REQUEST FOR CONSCIENTIOUS OBJECTOR STATUS FAIRLY AND COMPETENTLY

A. THE BOARD MEMBERS GAVE ADEQUATE CONSIDERATION TO PETITIONER'S STATEMENTS IN THE SSS FORM 150

Petitioner's claim that the local board failed to consider his request for conscientious objector status fully and fairly (Pet. Br. 42–47) is unpersuasive. It is true, as petitioner notes (Pet. Br. 43), that Member Downes only "scanned" petitioner's Selective Service file prior to the November 9 courtesy interview and that he could not recall whether he had read the completed SSS Form 150 *at that time* (A. 75). But Downes definitely recalled reading the Form 150 at

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service that proceeds partly on religious and partly on non-religious grounds meets the statutory test. The point, however, is inapposite. The board here, as petitioner acknowledges (Pet. Br. 30), did not reject petitioner's claim because it concluded that it was based on non-religious as well as religious considerations. The evident basis on which it rejected the claim, as appears from the earlier discussion and as the court of appeals' opinion generally indicates, was that, from petitioner's own showing, collectively viewed, he was really seeking an occupational deferment under the trappings and verbiage of a C.O. claim—that the stated beliefs, in short, were not sincerely and genuinely entertained.

For the same reason—the fact that the board's rejection of the C.O. claim was based on its view that the claim was not genuine—the question whether Congress can constitutionally limit the conscientious objector exemption to those whose opposition to participation in war is based upon religious training and belief (see Pet. Br. 37–39) is not presented on the instant record. Resolution of the issues in this case, therefore, does not depend upon the Court's decisions in *United States* v. *Sisson*, pending on direct appeal, No. 305, this Term, and *Welsh* v. *United States*, pending on writ of certiorari, No. 76, this Term.

or prior to the meeting of January 11, 1968, at which time the vote not to reopen was taken, and he testified that petitioner's statements in the form constituted "one of the things that prompted me to feel" that the classification ought not to be reopened (A. 79–80). Since the pertinent decision was not made until the January meeting, the member's uncertainty as to whether he had read the form before the November interview lacks the significance which petitioner would attribute to it. Moreover, contrary to petitioner's further suggestion (Pet. Br. 44), the acknowledgment by Downes that the only occasion he would have had to consider petitioner's file would have been during or prior to a board meeting—*i.e.*, that he never took the file home with him to "study it" (A. 80)—does not indicate that Downes' consideration of petitioner's case was either superficial or constitutionally inadequate. All the other members testified that they read the Form 150 at some time prior to the vote (A. 67, 68, 71, 72, 91 [Chairman Sherman], 81–82 [Wolking], 88 [Rickert]).[25] Petitioner's speculations as to the degree of care with which the members examined the Form 150 raise no issue of constitutional dimensions.

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[25] Member Wolking testified that, while he did not specifically recall reading the form, he knew that he "absolutely did" read it—at the time of the November interview—because "[i]f [petitioner's] case came before the Board I would have read whatever was in the Form 150" (A. 82). Rickert, the member not present at the interview, said he read the file prior to the January meeting and that he recalled the completed Form 150 (A. 88). All four members, as noted previously (*supra*, p. 22), testified that they felt they had given thoroughgoing and unbiased consideration to petitioner's case.

B. THE BOARD WAS NOT SHOWN TO BE INCOMPETENT

Nor is there validity to petitioner's contention that the board members exhibited such misunderstanding of the applicable law as to suggest that they were incompetent to pass intelligently on his C.O. claim (Pet. Br. 47–49).

Chairman Sherman, a lawyer, was not "confused regarding the distinction between" I–O [26] and I–A–O [27] classifications, as petitioner asserts (Pet. Br. 48). It is true that at one point in his testimony, perhaps through inadvertence, he gave the wrong designation, I–A–O, in describing the classification into which registrants opposed to participation in war in any form are placed (A. 91). He correctly noted, however, that such registrants are "given an opportunity to serve in some institution of his choosing for a period of, I believe it is two years * * *" (A. 91).[28] The chairman's error, in short, concerned the label, not the substance, of the category. Nor is it significant that at the trial Sherman was uncertain whether there was a special Selective Service classification for registrants who are conscientiously opposed to combatant service but who are willing to perform non-combatant duty (A. 90–91), particularly since the classification referred to (I–A–O) was not the classification petitioner had sought.

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[26] *I.e.*, registrants conscientiously opposed to participation in war in any form, including combatant and non-combatant service (32 C.F.R. 1622.14).

[27] *I.e.*, registrants conscientiously opposed to combatant service only (32 C.F.R. 1622.11).

[28] See 32 C.F.R. 1660.10, 1660.20, 1660.21.

Petitioner's only other criticism of Sherman's competence (Pet. Br. 48) involves the chairman's spontaneous definition of a conscientious objector, given under cross-examination by defense counsel, as an individual who has conscientious scruples against "taking another person's life" under any circumstances (A. 90). Petitioner notes that this is not the definition given in the statute (which speaks in terms of opposition to "participation in war in any form," see 50 U.S.C. App. (Supp. IV) 456(j)), and that a person who is willing to kill in self-defense may still be classified as a conscientious objector (Pet. Br. 48). The variance between the chairman's definition and the statutory one, however, was not in issue; moreover, the chairman immediately corrected his slip (A. 90). The suggestion that an inadvertence of this sort showed prejudicial incompetence is insubstantial.

Petitioner says that Member Wolking was unaware of the classification that is given to conscientious objectors (Pet. Br. 48). All that the record indicates, however, is that the member made no response when he was asked this question (A. 85). When the question was repeated, Wolking, without referring to a classification by symbol, said that a registrant so classified "would be offered a position in some hospital or some work that would permit him to serve in some other manner" (A. 85). This answer was of course correct, as petitioner's counsel acknowledged (A. 85). Thus, here again, the member's apparent uncertainty concerned only the symbolic tag assigned to the classi-

fication by the regulations; he was fully aware of the substantive significance of the category.[29]

It is accurate, finally, as petitioner notes (Pet. Br. 47–48), that Member Downes exhibited confusion under cross-examination as to the role of the board in processing conscientious objector claims. After the member had stated his understanding that a conscientious objector could serve in some civilian capacity in lieu of being drafted into the military, and after defense counsel had asked if it was not true that the board has to make that decision and that the registrant "can't do it just on his own," Downes said: "The draft board, I thought now, was involved primarily with determining the availability of people" (A. 78). While the quoted comment was not responsive to the question, the member's attempt a moment later to answer the question was cut off by the court's ruling that although counsel had full liberty to explore for arbitrariness, capriciousness, or unfairness, he would not be permitted to cross-examine a board member with respect to the content of the law or its application (A. 78). Even if it is assumed that Downes could not have answered the question adequately, this single aberration on the part of one member of the board hardly demonstrates that the board as a body incompetently handled petitioner's case. Indeed, rather than illustrating incompetence

[29] Petitioner notes (Pet. Br. 48) that Wolking appeared confused as to whether, in signing the Form 150, petitioner had indicated unwillingness to perform civilian service in the national interest (A. 85). The discussion on this matter terminated inconclusively as the result of a ruling that the point was not relevant (A. 85–86).

on the part of the board, the incidents discussed herein, viewed cumulatively, reveal the extraordinary lengths to which the court permitted defense counsel to go in exploring through cross-examination the mental processes of the members of the board.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APRIL 1970.

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

Supreme Court, U.S.
FILED
APR 13 1970
JOHN F. DAVIS, CLERK

JOSEPH THOMAS MULLOY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, *AMICI CURIAE*

Interest of Amici*

Interest of American Civil Liberties Union

For half a century the American Civil Liberties Union has defended the fundamental rights afforded by the Bill of Rights. In particular, it has represented those who have asserted the rights of conscience and religious liberty protected by the First Amendment and the right to due process of law as guaranteed by the Fifth Amendment, against governmental infringement. Indeed, the ACLU was

* Written consents by the attorneys for both parties have been filed with the Clerk.

founded in the crucible of the First World War to defend the rights of conscientious objectors.

In accord with our commitment to the protections of conscience and due process the ACLU is now heavily engaged in the representation of young men charged with alleged violations of the draft laws. As one Federal Court has recently stated, "Those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).

We file this brief in order to present to the Court our arguments of law which support those principles.

Interest of the Central Committee for Conscientious Objectors

The Central Committee for Conscientious Objectors (CCCO) is a non-profit service organization founded in 1948 to assist persons who find themselves facing conflict with the power of the State as a result of conscientious objection to participation in war. In 1968, amicus counseled over 10,000 young men with problems relating to compulsory military service. The counseling services are national in scope; CCCO has, aside from its headquarters in Philadelphia, regional offices in San Francisco and Chicago. In addition, CCCO has cooperating counselors and cooperating attorneys in every state and is widely recog-

nized as one of the most expert and experienced draft counseling agencies. Of the registrants counseled by CCCO in 1968, the majority were considering or seeking conscientious objector status or student, medical, hardship or other deferments.

CCCO charges no fees for its services to registrants, attorneys, or any other persons. Its views on various questions relevant to its expertise have, from time to time been solicited by officials of the Selective Service System and by members of Congress.

Because the procedures relating to the question of reopening a Selective Service classification are involved and complex, CCCO devotes a substantial amount of time—preparation of memoranda, responding to telephone and mail inquiries, and direct counseling—to these activities. CCCO has counseled and continues to counsel numerous conscientious objectors. CCCO, thus has a direct interest in preserving the rights of these religious objectors.

Questions Presented

1. Whether the Courts below erred in holding that petitioner was not entitled to a reopening of his classification?

2. Whether the Courts below erred in holding that a *de facto* reopening of petitioner's classification did not take place?

3. Whether the Court of Appeals applied an improper standard of judicial review in determining if petitioner was entitled to a reopening of his classification?

Statement of the Case

On October 17, 1967, petitioner, then twenty-three years old, wrote a letter to his Selective Service Local Board No. 47, Louisville, Kentucky, which read in pertinent part, "after much, much thinking, seeking and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form" (A. 41).*

In response to this letter, the local board sent him a Special Form for Conscientious Objectors (SSS Form 150), which he completed and returned on October 26, 1967. He gave detailed answers to the questions on the form, stating among other things that he believed in a Supreme Being and that to be a member of the Armed Forces of any country would oblige him to kill or indirectly assist in killing (A. 19). Additionally, various letters, including one from a Catholic priest, were submitted to the board in support of petitioner's request for deferment as a conscientious objector.

This case does not involve the special questions inherent in a post-induction order application for conscientious objector classification. See *United States* v. *Gearey*, 368 F.2d 144 (2nd Cir. 1966) *(Gearey I)* and *United States* v. *Gearey*, 379 F.2d 915 (2nd Cir. 1967) *(Gearey II)*. Both at the time that petitioner advised his local board that he was a conscientious objector, and at the time that he filed his SSS Form 150, petitioner had not been ordered to report for induction.

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* All references (A. —) are to petitioner's Appendix.

In response to petitioner's request for an appearance before the board, a "courtesy interview" was held on November 9, 1967. The meeting lasted between ten and fifteen minutes (A. 77). The Chairman of the board stated "at that time the Board came to the conclusion that there was no merit to his contention that he was entitled to conscientious objector status." An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened" (A. 14). The board, however, did not take a vote at the meeting of November 9th. On November 12, 1967, petitioner wrote a letter to the board setting forth his views more fully (A. 58). It was this letter which, according to the Court of Appeals, "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F.2d at 425.

On January 11, 1968, the board formally considered petitioner's claim for classification, and by a vote of 4-0 took the following action as noted in the Classification Questionnaire: "All information in file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of 1A class" (A. 14). On January 21, petitioner wrote to the board, appealing from the board's failure to reclassify him in Class 1-O stating that he considered his case to have been reopened. The board wrote in reply two days later that it did not consider his case to have been reopened and that he had no right to appeal (A. 64, 65). On the same date he received an order to report for induction on February 23, 1968.

On February 8, 1968, petitioner filed a civil action in the United States District Court for the Western District of Kentucky, seeking to enjoin his induction into the Armed Forces on the ground that the order to report for induction was void, as having been issued in violation of applicable Selective Service Regulations and in such circumstances as to violate due process of law. On February 16, 1968, the Court dismissed his complaint and denied relief. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, together with a motion for an interlocutory injunction pending appeal. The latter motion was denied on February 22, 1968. On February 23, 1968, the petitioner reported to the induction station but refused to submit to induction into the armed forces. The appeal in the civil case was dismissed as moot by the Court of Appeals on May 2, 1968. The petitioner was thereafter indicted, tried and convicted.

ARGUMENT

I.

Since petitioner made out a prima facie claim for conscientious objector status, he was entitled to a reopening of his classification.

The Court of Appeals in every judicial circuit in the United States, including the Sixth, has held that where a registrant presents new facts to his local board not previously considered and those facts, if true, would entitle him to reclassification, then the local board is compelled to reopen his classification.[1] See 32 C.F.R. 1625.2.

While the several Courts of Appeals have varied somewhat in defining the prima facie case for a requested classification which will trigger the reopening process,

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[1] See *United States* v. *Stoppelman*, 406 F.2d 127 (1st Cir. 1969); *United States* v. *Gearey*, 379 F.2d 915, fn. 11 (2nd Cir. 1967) adopting the standard enunciated in *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D.N.Y. 1966); *United States* v. *Turner*, —— F.2d ——, No. 17685 (3rd Cir. Feb. 10, 1970) following *United States ex rel. Berman* v. *Craig*, 207 F.2d 888 (3rd Cir. 1953); *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *Robertson* v. *United States*, 404 F.2d 1141 (5th Cir. 1969) rev'd *en banc* on other grounds 417 F.2d 440; *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956); *United States* v. *Freeman*, 388 F.2d 246 (7th Cir. 1967); *Davis* v. *United States*, 410 F.2d 89 (8th Cir. 1969); *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967); *Owens* v. *United States*, 396 F.2d 540 (10th Cir. 1968).

Indeed some courts have found the right to a reopening of one's classification upon the presentation of new facts not previously considered so strong that the action of a local board in refusing to reopen was so "basically lawless" as to warrant pre-induction judicial review. See *Hunt* v. *Local Board*, —— F.2d —— (3rd Cir. No. 18076 March 24, 1970); *Barker* v. *Hershey*, 2 SSLR 3390 (W.D. Wisc. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969).

amici believe the test carefully enunciated by Judge Weinfeld in *United States* v. *Burlich*, 257 F. Supp. 906 (S.D.N.Y. 1966) and adopted by the Second Circuit in *Gearey II*,[2] *supra*, properly states the definition of a prima facie case for reopening:

> "A prima facie case is made out if a registrant has presented facts which, if true and uncontradicted by other information contained in his file, would be sufficient under the regulations to warrant granting his reclassification." 257 F. Supp. at 911.

See also *United States ex rel. Wilkerson* v. *Commanding Officer*, 286 F. Supp. 290 (S.D.N.Y. 1968); and see Hershey, *Legal Aspects of Selective Service*, 36 (1969).

Only one month after petitioner's local board refused to reopen his classification, the General Counsel of the Selective Service System stated an unequivocal reopening policy that is considerably broader than the prima facie standard of *Burlich* and *Gearey II*.

> "In every case in which a claim of conscientious objection is filed by a registrant prior to the issuance of an induction order, it has been the consistent policy of the Director to require reopening of such registrant's classification."

1 SSLR 22 and 25, reporting a letter of Feb. 21, 1968 to the Massachusetts State Director of Selective Service. See

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[2] Unlike *Gearey*, however, this case does not involve the issue of a local board's refusal to reopen a registrant's classification after a registrant has been mailed an order to report for induction.

also Selective Service *Local Board Memorandum* 41 as amended July 30, 1968, reported at 1 SSLR 2174.[3]

Thus the essential question is whether the record reveals that petitioner met the basic requirements of a conscientious objector claim.

While petitioner, as any registrant, must do more than state baldly that for conscientious reasons he is opposed to participation in war in any form, but cf. *United States* v. *Freeman, supra,* he is entitled to the presumptions in his favor implied by the term *prima facie.* He need not prove his case to the hilt as he would have to do if the case were already reopened.

> "In determining whether a prima facie case for reopening has been made out, the Court, in accordance with generally applicable legal practice, must construe the facts in a way most favorable to the registrant . . . the Board is required to reopen if a prima facie case is made out." Weinstein, J., *United States* v. *Baker,* 1 SSLR 3017; 3018 (E.D.N.Y. 1968).

Accord: *Murray* v. *Blatchford,* 307 F. Supp. 1038, 1055 (D.R.I. 1969); *United States* v. *Turner, supra; United States* v. *Freeman, supra.*

Petitioner demonstrated a strong religious background. He wrote a reasoned, detailed statement of his beliefs, which on its face were those of a classic conscientious objector, cf. *United States* v. *Seeger,* 380 U.S. 163 (1965); and were obviously rooted in his religious background.

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[3] In *United States* v. *Stout,* 415 F.2d 1190 (4th Cir. 1969), the Court held that administrative policy statements of the Selective Service System had the force of law.

He documented the substance of his beliefs as best he could by letters attesting to his sincerity. Surely no more can be required for a prima facie case.

If the standard for reopening is not to be equivalent to the standard of ultimate success in a conscientious objector application, petitioner's prima facie application must be held sufficient. In *United States* v. *Bryant,* 293 F. Supp. 922, 932 (N.D. Ark. 1968), the Court held:

> "A prima facie case was established when the defendant formally attested that he was conscientiously opposed to participation in war in any form, and persons knowing the defendant attested to his sincerity. No statement made by the defendant is in any way inconsistent with his professed belief."

See also *United States* v. *James,* 417 F.2d 826, 829 (4th Cir. 1969):

> ". . . it is perfectly clear that defendant's timely assertions to his local board, if believed, demonstrate that he was brought up in, and had embraced, the religious tradition of one of his parents, who belonged to a denomination, the members of which have consistently opposed participation in war. Defendant asserted his personal objections, in light of this tradition, to participation in war in any form. He thus presented a prima facie case for exemption." (Citations omitted.)

The Third Circuit recently reaffirmed its prior holding in *United States ex rel. Berman* v. *Craig,* 207 F.2d 888 (1953). In *United States* v. *Turner, supra,* the Court held that

> "the rule is well established that where one who has originally made no claim to conscientious objector

status and has been classified 1-A later seeks a conscientious objector status because of changed circumstances the board is required to reopen his classification if the claim which he has presented is adequate on its face, and only then may the board determine the merits of the claim.

There is a substantial reason which underlies the judicial doctrine. For if the request to reopen is granted the board must classify the registrant de novo and mail notice of the new classification to him, which then forms the basis for the registrant's right to appeal and appear personally before the board. On the other hand, when the board refuses to reopen a classification, there is no right of appeal. It would therefore be a denial of procedural due process if local boards prevented administrative appeal from a refusal to reclassify by casting it in the form of a refusal to reopen." *Turner, supra,* p. 2 (slipsheet opinion).

Judge Kalodner, in his concurring opinion, stated the rule even more bluntly:

"When a claim, in writing, for change in classification is presented by a draft registrant on grounds, which, if established by substantial proof, would entitle him to the change sought, a draft board is required to reopen and consider the existing classification so as to afford the registrant the due process right of appeal if his claim is denied." *Turner, supra,* p. 10 (slipsheet opinion).

The Court below disregarded all of these considerations and held that it is completely within the discretion of the

local board to make such investigation as it wishes of whether the new facts are true or false and then to decide to reopen or not to reopen based on its own unstated and undisclosed investigation and findings, if any. *United States* v. *Mulloy*, 412 F.2d 421, 423 (6th Cir. 1969). What the Court overlooks is the first principle of due process of law—that the most reliable way of searching for the truth where a citizen is before a government agency is through the hearing process—and that the most dangerous and least reliable way is by allowing the government agency to do it in secret and then announce its unappealable conclusion.

As the Second Circuit recognized in *United States* v. *Delfin*, 419 F.2d 226, 228 (2nd Cir. 1969):

> "Applications for classification as a conscientious objector present subtle questions difficult to resolve except upon the fullest consideration, and, as Congress recognized, fairness to the applicant requires that they not be disposed of in a summary manner."

The Board members plainly did not question petitioner's sincerity (A. 71, 72, 84, 86). The Court below does not cite a single instance in the record where the Board expressly or by implication questioned the sincerity of the claim. The basis for the holding below appears to be rather the Court's *own doubts* of petitioner's sincerity,[4] coupled with

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[4] The opinion below states that "the Board had the right to consider inconsistent statements made by the registrant as well as any fact which cast doubt on his veracity," 412 F.2d at 425, but the only reference to the trial record is the Board Chairman's testimony that Mulloy "did not make out a case for conscientious objection." *Ibid.* This is plainly no evidence of a Board finding of inconsistency or of a Board doubt of veracity. Then the opinion below mentions three items which "the Board had the right to take into account," *ibid.*, although there is absolutely no

the Court's erroneous view of the legal sufficiency of petitioner's religious beliefs:

> "Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F.2d at 425.

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evidence that the Board did so, and in any event none of them provides a legally sufficient ground for denial of conscientious objector status: (1) The registrant did not claim to be a conscientious objector when he registered at age 18, and only did so "when time was running out for him." *Ibid.* If the *Gearey* cases, *supra*, which the Court below cites approvingly, *id.* at 424, stand for anything it is that one need not declare himself as a conscientious objector at age 18 in order to be legally recognized as such, since conscientious objector views can genuinely crystallize at any time in a young man's development, even after the receipt of an induction order. Indeed, under the *Gearey* philosophy, it is error to reject a claim because it was asserted late rather than early in one's Selective Service history, and it is the plainest error to infer some disability, or to require a greater quantum of proof, for a young man who did not so declare at age 18. (2) The opinion below cites a letter written by petitioner's brother which stated that "he has maintained this position for a number of years." *Id.* at 426. But the letter could just as easily be referring to petitioner's overall idealistic views, or his general opposition to war, and, in any event, petitioner, who was classified II-S (college student) and II-A (occupational deferment) until May of 1967, was not obliged to inform the Board of his desire to be classified as a conscientious objector so long as he was entitled to any lower classification. See *United States* v. *Bornemann*, —— F.2d ——, No. 33716 (2nd Cir. Jan. 5, 1970). (3) The opinion below states that petitioner was incorrect in his assertion to the Board that he was subject to a $5,000 bond in a Federal Court proceeding. Amici are baffled as to what this has to do with the sincerity of a claim for conscientious objection. See *United States* v. *Rempel*, 220 F.2d 949 (10th Cir. 1955). Finally, amici must observe that an attitude of unseemly suspicion and hostility towards petitioner is reflected by the gratuitous statement that petitioner attempted to "fool" the Board and the District Court, *id.* at 426.

This Court, in *United States* v. *Seeger,* 380 U.S. 163 (1965) construed the statutory definition of a conscientious objector broadly. Thus it was held that " . . . any exception to it must be interpreted narrowly." 380 U.S. at 186.

> "[T]he use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but *which is the sole basis for the registrant's belief* and is in no way related to a Supreme Being." *Ibid.* (emphasis added).[5]

A mere comparison of petitioner's claim with his letter of November 17, 1967 demonstrates that there was indeed substantial religious content to his objection and thus the letter does not supply a basis in fact for the board's refusal to reopen, as the Court below held, *Seeger, supra.* See also *United States* v. *Levy,* 419 F.2d 360, 367-368 (8th Cir. 1969); *United States* v. *White,* —— F.2d ——, No. 26629 (5th Cir. Dec. 3, 1969); *United States ex rel. Brooks* v. *Clifford,* 409 F.2d 700, 708 (4th Cir. 1969); *Pitcher* v. *Laird,* —— F.2d ——, No. 28285 (5th Cir. Jan. 30, 1970); *Fleming* v. *United States,* 344 F.2d 912, 915 (10th Cir. 1965); *Bates* v. *Commanding Officer,* 413 F.2d 475, 479 (1st Cir. 1969); *United States* v. *Pence,* 410 F.2d 557, 562 (8th Cir. 1969); *Kessler* v. *United States,* 406 F.2d 151 (5th Cir. 1969).

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[5] The Court below implies that the Military Selective Service Act of 1967, which shortened the definition of conscientious objection so as to eliminate the requirement of belief in relationship to a Supreme Being, had the effect of cutting down this Court's holding in *Seeger.* If anything, a better argument can be made to the contrary. See *United States* v. *Levy,* 419 F.2d 360, 366 (8th Cir. 1969), which concludes that *Seeger* is unchanged by the amendment.

Petitioner made out a prima facie case for conscientious objector status[6] and the Court below erred in finding that the local board did not deprive him of due process when it refused to reopen his classification.

II.

A *de facto* reopening of petitioner's classification took place by reason of the scope and intensity of the local board's inquiry. The Court below erred in not finding that petitioner had therefore been illegally denied his rights of personal appearance and appeal attendant to such reopening.

It is well recognized by the courts, as well as by the Selective Service System, that a local board cannot make an evaluative determination upon the merits of a registrant's request for reclassification and then summarily refuse to reopen his classification. To do so would cut off his rights of personal appearance under 32 C.F.R. §1624 and appeal, 32 C.F.R. §1626. *Nothing prevents a local board from reopening a registrant's classification and then retaining him in 1-A status.* This procedure is expressly authorized by 32 C.F.R. §1625.11. At least, however, he is given the minimal due process safeguards of personal appearance and appeal which follow a reopening. 32 C.F.R. §1625.13.

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[6] The government seems to concede in its Brief in Opposition at page 18 that the "new information" which petitioner presented in the representations made in Form 150 and the accompanying letters did present a prima facie showing that he met the statutory conscientious objector standard. This was not the view of the Court below. See 414 F.2d at 426.

In the case at bar, the Court below held that the board could not only reach the merits of an applicant's request for deferment at the initial stage of determining whether or not to reopen, but in fact had a duty to reach the heart of the claim at such a preliminary stage. It is respectfully submitted that the Court below was in error.

Miller v. *United States,* 388 F.2d 973 (9th Cir. 1967), involved a registrant's request to reopen his classification on grounds of conscientious objection after receipt of an order to report for induction. Additionally, the State Director of Selective Service had given the local board permission to disregard the post-induction order restrictions of 32 C.F.R. §1625.2. The board considered the registrant's application and then refused to reopen.

The Ninth Circuit found that what the board actually did was to engage in an

> ". . . evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation entitled to credence as fact." 388 F.2d at 975.

The Court held that this amounted to a determination of the question of classification and that,

> "While the local board labeled what it has done as a denial of reopening in form, the substance of what it did was, as indicated, to consider the new information . . . received, weigh this against other probative factors, and then evaluatively concluded that appellant's previous 1-A classification was proper in the situation." 388 F.2d at 976.

In reversing appellant's conviction, the *Miller* court held that it was not

> "... validly possible for these [procedural] rights [personal appearance and appeal] to be cut off ... by a local board's choosing not to reopen, but to nevertheless engage in a similar consideration of the situation upon its merits, and then to accord to its classification result the status of a denial merely of the claimant's motion to reopen." 388 F.2d 976.[7]

See also *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *United States* v. *Clark*, 105 F. Supp. 613 at 615 (W.D. Pa. 1952).

A number of recent decisions have analyzed the issue of "de facto" reopening. Judge Weinstein, in *United States* v. *Baker*, 1 SSLR 3017 (E.D.N.Y. 1968) saw that,

> "... there was no difference between the way the [discretionary] interview was conducted and the way it would have been conducted had there been a reopening of this classification and a full review of the facts to determine sincerity."

And at 3019:

> "... a full inquiry and hearing of the registrant's contentions did take place even though it was designated an 'interview' and the local board panel may well have believed that it was only holding a hearing to decide if a reopening was required. *The panel's distinction be-*

[7] The Court below recognizes that the *Miller* decision supports petitioner's argument but fails to analyze or distinguish it. 412 F.2d at 425.

tween a regular meeting and a special meeting is of no significance. Under the circumstances . . . a reopening of the classification did occur as a matter of law." (Emphasis added.)

Identically, in *United States* v. *Westphal,* 304 F. Supp. 951 at 954 (D.S.D. 1969), the Court held that,

"... when the local board invited the registrant to appear before it in connection with his request for conscientious objector status, that was in effect a reopening of his classification ..."

The Fourth Circuit, in *Davis* v. *United States,* 410 F.2d 89 (1969), relying on *Robertson* v. *United States,* 404 F.2d 1141 at 1146 (5th Cir. 1969), *rev'd en banc on other grounds* 417 F.2d 440, held that the board improperly considered the issue of sincerity without first reopening the registrant's classification. Thus, having cut off the registrant's right to appeal on that crucial issue, the registrant was held to have been denied due process. See also *Lane* v. *Allen,* 307 F. Supp. 881 (N.D. Ohio 1969).

In *United States* v. *Melrose,* —— F. Supp. ——, Cr. 68-124s (D.S.D. December 4, 1969) the court held,

"... when the local board proceeded ... to review 'all the evidence in the file' including that submitted following its original classification, it has reached a determination on the merits through a de facto reopening of the defendant's classification. The action of the board in labeling its determination a decision not to reopen was a denial of the defendant's procedural rights." (Slipsheet opinion, p. 6.)

Judge Pettine, in his opinion in *Murray* v. *Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969), recognized the problem of a *de facto* reopening incurred by a board which followed the kind of rule urged by the Court of Appeals below.

> "... local boards may run four-square into the problem of determining the merits of a registrant's claim under the guise of determining whether his claim is *prima facie* sufficient [for a reopening]. This would constitute a de facto reopening ... If the local board goes beyond the information set forth in the registrant's statement, it is violating 32 C.F.R. 1625.4 and depriving the registrant of his rights to personal appearance and to an appeal." *Id.* at 1066.

Clearly, a "de facto" reopening occurred in the instant case. The board interviewed petitioner and indeed some members believed he was requesting an occupational deferment. His file was reviewed twice, once at the board's meeting of November 9, 1967 and again at the meeting of January 11, 1968. After the meeting the following notation was made in petitioner's Selective Service file:

> *"All information in file was considered* including claim of Conscientious Objector. All members present felt this information did not warrant reopening of 1-A class" (A. 14). (Emphasis added.)

Such a finding on the merits was characterized by the board as not amounting to a reopening, thereby cutting off petitioner's rights of personal appearance and appeal. The Court below compounded this error by ratifying the local board's action and apparently approving of the legal fiction

that a reopening in fact is not a reopening as a matter of law.

The Selective Service System itself has stated,

> "Where a local board complied with the essential requirements there was a reopening . . ." Hershey, *Legal Aspects of Selective Service,* 35 (1969).

See also this Court's discussion in *Witmer* v. *United States,* 348 U.S. 375 at 383-384 (1954) of what appeared to have been a "de facto" reopening of Witmer's classification with regard to his claim for a ministerial exemption.

While the board characterized its finding as a refusal to reopen petitioner's classification, the determination was in truth and fact a decision regarding the issue of classification itself, and thus a decision on the merits took place. The action was erroneously approved of by the court below. This "de facto" reopening should have invested petitioner with rights of personal appearance and appeal. 32 C.F.R. §1625.13, §1624, §1626. These rights having been withheld from petitioner after a "de facto" reopening of his classification, a violation of procedural due process occurred.

Legal fictions may have their utility, but it is a cruel and cynical doctrine which exalts form over substance and allows a man to be deprived of his liberty because an administrative agency arbitrarily chooses to use a label which will cut off his valuable procedural rights. A creature which looks like a cat, walks like a cat, eats like a cat, and purrs like a cat, is indeed a cat, even if some administrative agency calls it a dog. Amici respectfully urge that the court below did not heed the admonition of

Chief Justice Taft that courts should not be so blind that they refuse to recognize what all others can see. See *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922); *Gomillion* v. *Lightfoot*, 270 F.2d 594, 608 (5th Cir. 1959) (dissenting opinion by Circuit Judge Brown). It is, we submit, the duty of courts reviewing administrative action, to make certain "that the image of the administrative process is not transformed from a Rubens to a Modigliani." *Cinderella Career and Finishing Schools* v. *Federal Trade Commission*, 38 USLW 2517, 2518 (D.C. Cir. Mar. 20, 1970, Tamm, J.).

III.

The Court below erroneously applied the "basis in fact" test in determining whether petitioner was entitled to a reopening of his classification.

As stated at page 8, *supra*, amici believe the proper test of whether or not a registrant is entitled to a reopening of his classification is whether a registrant presents new facts which, "if true and uncontradicted by other information contained in his file, would be sufficient under the regulations to warrant granting his reclassification." *United States* v. *Burlich*, *supra*, at 911. Accord: *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *United States* v. *Powers*, 413 F.2d 834, 838 (1st Cir. 1969); *Howze* v. *United States*, 409 F.2d 27 (9th Cir. 1969); *Petrie* v. *United States*, 407 F.2d 267 (9th Cir. 1969), *en banc*; *United States* v. *Gearey*, 379 F.2d 915, 922 fn. 11. Additionally, a registrant is entitled to the presumptions in his favor implied by the term *prima facie*. *United States* v. *Freeman*, 388 F.2d 246 (7th Cir. 1967); *United States* v.

Baker, 1 SSLR 3017 (E.D.N.Y. 1968); *Murray* v. *Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969).

In applying the "basis in fact" test, rather than the test enunciated in *Burlich, supra*, the Court erroneously made the standard for reopening equivalent to the standard of ultimate success on the merits. Additionally, the power of the courts to determine violations of procedural due process would be no greater than their power to determine the substantive validity of a classification. Cf. *Petrie* v. *United States*, 407 F.2d 267, 245 (9th Cir. 1969); *United States* v. *Ransom*, 223 F.2d 15 (7th Cir. 1955). See also *Mizrahi* v. *United States*, 409 F.2d 1219 (9th Cir. 1969).

Finally, the Court below in finding that a "basis in fact" existed on a ground other than that which the board found, violated the rule that the action of the board must be supported on the same grounds that it gave for such action. *Gatchell* v. *United States*, 378 F.2d 287 (9th Cir. 1967); *Owens* v. *United States*, 396 F.2d 540, 543 (10th Cir. 1968); *United States* v. *Hawley*, 2 SSLR 3113 (D. Minn. 1969); *Benway* v. *Barnhill*, 300 F. Supp. 483 (D.R.I. 1969); *United States* v. *Balderrama*, 304 F. Supp. 822 (W.D. Tex. 1969). See also *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Crane* v. *Hendrick*, 284 F. Supp. 250 (N.D. Cal. 1968).

CONCLUSION

For the foregoing reasons, amici respectfully urge that the judgment below should be reversed.

Respectfully submitted,

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* Attorneys for amici gratefully acknowledge the invaluable assistance of Mr. Edwin Oppenheimer, Jr., of the New York Civil Liberties Union Selective Service and Military Law Panel.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 14 1970
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

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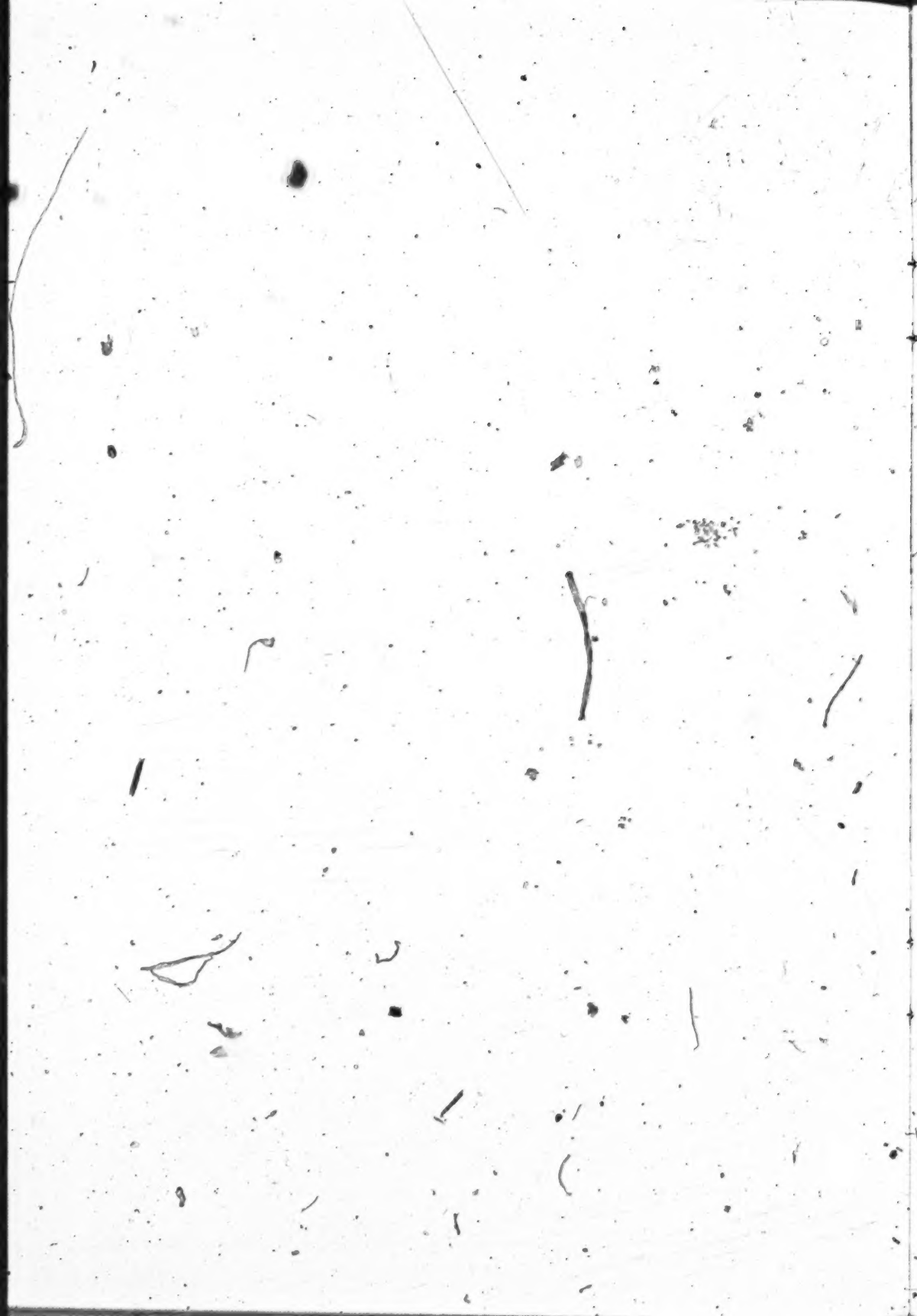

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I

The Local Board Improperly Refused to Reopen the Petitioner's Classification.

The petitioner has contended that in the circumstances of this case either the board was required to reopen his classification and consider his claim of conscientious objection on the merits or that, in fact, the board did reopen his classification, rejecting the claim on the merits, but denying the petitioner the

administrative appeal to which he was entitled under the regulations. In his brief petitioner argued that (l) he made out a prima facie case for classification as a conscientious objector and that (2) the board engaged in evaluative consideration of the claim on the merits under the guise of determining that the petitioner did not make out a prima facie case. (Brief for Petitioner, pp. 12-22). The government now concedes that "the new information he presented in the representations contained in the Form 150 and in the accompanying letters did constitute a prima facie showing that he met the statutory standard for C.O. status.", (Brief for United States, pp.28-29).This departure from the government's original position, which was that the petitioner had not made out a prima facie case, (Civ. Tr. 13), will serve to narrow the issues somewhat. The government also appears to concede that the board engaged in evaluative consideration of the claim on the merits. Its position is that the board is not required to reopen even where the new facts alleged would, if true, justify a change of classification, and that in such circumstances evaluative consideration does not constitute a reopening in fact. (Brief for United States, pp. 26-36). By so arguing, it must implicitly concede that if no such authority exists, the board was required to reopen the petitioner's classification in the case at bar or that it reopened the classification in fact. Either way the induction order would be void and the conviction of the petitioner would have to be reversed. *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967); *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967).

The crucial question then is whether the board was justified in refusing to reopen the petitioner's classification despite the presentment of a prima facie case of conscientious objection. The government argues that the board was not required to reopen here because (1) a board has "discretion" to refuse to reopen despite the presentment of a prima facie case, (Brief for

United States, pp. 29-30), and (2) that discretion is properly exercised where the board has compelling reasons for questioning the veracity or sincerity of the allegations. (Brief for United States, p. 35). It is the submission of the petitioner that there is no discretion to refuse to reopen where a prima facie case for classification as a conscientious objector has been made, and that, even assuming such discretion, in the case at bar the board did not in fact question the petitioner's veracity or sincerity, and had no compelling reason for so doing.

A. Where a Request for Classification as a Conscientious Objector Has Been Made for the First Time, and the Information Submitted in Support of the Request, If True, Would Entitle the Registrant to Such Status, the Board Must Reopen the Classification.

Heretofore, all courts but the Sixth Circuit have assumed that whenever a prima facie case for *any* classification has been made out, the board must reopen. As stated in a recent District Court case, *Radel v. Commanding Officer*, ___ F. Supp. ___, (E.D. Pa. 1969), 2 SSLR 3430, "It is well settled that a Local Board must reopen upon request if the registrant has presented a prima facie case for the classification claimed." The argument that the board has discretion to refuse to reopen if it decides that a registrant claiming conscientious objector status is not sincere was expressly rejected in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). There the board found that the registrant had previously applied for enlistment in a reserve program, for which he had not been accepted, and as a result was of the opinion that the registrant "was seeking to avoid induction." According to the Court, the board decided that, "regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation entitled to credence in fact." 388 F.2d at 976. It was the view of the Ninth Circuit there was no discretion to refuse

to reopen upon the presentment of a prima facie case and, that, therefore, the board necessarily had engaged in evaluative consideration.

The government does not try to reconcile the decision of the Sixth Circuit in the case at bar with the decision of the Ninth Circuit in *Miller*, although it claims that the other cases cited by the petitioner are reconcilable on the ground that in those cases the board had no reason to question the veracity or sincerity of the registrant. Nor does it try to reconcile the decision in the case at bar with that of the Eighth Circuit in *Davis v. United States*, 410 F.2d 89 (8th Cir., 1969), holding that, "Where the statements, if accepted at face value, constitute a prima facie case for the conscientious objector classification, the board is required to reopen the classification." 410 F.2d at 94-5. The government can cite no case where a Court of Appeals has sanctioned the interpretation that the government is putting upon the board's power to refuse to reopen a classification despite the presentment of a prima facie case. The government should bear a heavy burden in persuading this Court that its interpretation of the regulations is the proper one.

The only textual support in the regulations that the government can find for its argument is that 32 C.F.R. Section 1625.2 says that a board *may* reopen the classification in the circumstances defined. It also points to the use of the word *shall* in Section 1625.3 and *shall* not in Section 1625.4. As pointed out in the petitioner's main brief, pp. 16-17, any implied discretion in the word "may," would relate to the situation where the registrant had failed to reasonably inform the board of the new facts. More significantly, however, important procedural rights should not be made to depend on "may-shall" distinctions. "It is well established that the word 'may' can be at times construed to mean 'shall,' just as the word 'shall' may be construed to mean 'may.' The interpretation of

those words depends upon the context in which they are used and the intention of the legislative body as is shown by the statute and as may be gleaned from committee reports and similar authoritative sources." *Kraft v. Board of Education*, 247 F.Supp. 21, 24 (D.D.C. 1965). This is particularly so when dealing with procedural requirements. "It is generally recognized that whether procedural requirements . . . are mandatory cannot be determined by merely examining the form of the statute involved, *i.e.*, by a mere literal reading of the law but 'can only be determined by ascertaining the legislative intent.' If a requirement is so essential a part of the plan that the legislative intent would be frustrated by a non-compliance, then it is mandatory." *United States v. Regis Paper Co.*, 355 F.2d 688, 692 (2d Cir., 1966). As pointed out in the main brief, pp. 15-16, the very nature of classification under the present Selective Service Act presupposes that changes will occur with some frequency. There are certain situations where the power of the board to reopen is specifically restricted. But where no restriction is imposed on that power, the clear import of the regulatory scheme is that the classification is to be reopened whenever a prima facie case has been presented. In this sense the use of "may" becomes mandatory.

All a reopening means is that the claim will be considered on the merits and that the registrant has the right to a personal appearance and an appeal. It is not possible for a registrant to "delay his induction by successive requests and appeals." The board may refuse to reopen on the ground that the facts giving rise to the claimed classification existed at the time of the original classification and were not brought to the board's attention then. 32 C.F.R. Section 1625.1 (b); *Keene v. United States*, 266 F.2d 378 (10th Cir., 1959). Likewise the facts may not, as a matter of law, be sufficient to make out a prima facie case. See *United States v. Hamsuk*, 419 F.2d 929 (7th Cir.,

1970); *Robertson v. United States*, 417 F.2d 440 (5th Cir., 1969). Moreover, where the registrant is not seeking a new classification, but is submitting new evidence in support of a classification that has previously been denied, the burden of establishing a case of prima facie entitlement is correspondingly greater. *Cf. Woo v. United States*, 350 F.2d 922 (9th Cir., 1965). And whether a classification must be reopened prior to the issuance of an induction order has nothing to do with the question of what constitutes "circumstances beyond a registrant's control," requiring a reopening after an order for induction has been issued. Indeed, the limitation on the board's power to reopen after an induction order has been issued makes it all the more imperative that the board reopen upon presentment of a prima facie case prior to the issuance of an induction order.

The government next raises the spectre that if the board has no discretion to refuse to reopen, the operation of the Selective Service System may be frustrated and implicitly that the United States will be unable to field an army. This contention is scarcely credible at a time when despite the fact that more registrants are deferred or exempt than are classified as available for service, so many are classified as available that a lottery system of selection for induction has become necessary. Nor is it now possible for a registrant to escape induction due to delays in processing. Any registrant in Class 1-A or 1-A-O whose random sequence number is reached, and who would have been ordered to report for induction except for delays due to a pending personal appearance, appeal, preinduction examination, reclassification, or otherwise, is ordered for induction even if the year in which he otherwise would have been ordered to report has ended and even if he has attained his twenty-sixth birthday. 32 C.F.R. Section 1631.7(a). The present petitioner was twenty-three at the time he applied for reclassification and

there was no danger that he would avoid induction due to age even if his classification had been reopened.

The reason why a reopening is mandated upon the presentment of a prima facie case goes to the essence of due process. The concept of due process is centered largely around standards designed to assure opportunity for full presentation of evidence so that the truth may be established as accurately as possible. This is embodied in the scheme established by the Selective Service regulations. Only by a personal appearance can it be assured that the registrant will have the opportunity to fully present his evidence to the board. In the case of a registrant claiming conscientious objector status, it is only by such an appearance that he can explain the nature of his beliefs and try to convince the board of his sincerity. The "courtesy interview," to which the government refers, would presumably be discretionary under the government's view, since 32 C.F.R. Section 1625.1(c) reads, "Registrants *may* be questioned." Therefore, the board would be able to refuse to reopen the classification without ever having seen the registrant or having heard him state his views.

Moreover, the regulations also provide for an administrative appeal in the case of reopening. 32 C.F.R. Section 1625.13. The regulatory scheme envisions the appeal board making the same kind of merits determination as the local board. If the local board determines the question unilaterally and refuses to reopen, the appeal is denied. No matter what doubts the local board may have about sincerity or veracity or no matter what its investigation may show, under the regulations, the appeal board is to review its determination. To allow the board to determine disputed facts or state of mind unilaterally and to then refuse to reopen the classification is completely inconsistent with the purpose of Section 1625.13, which authorizes an appeal following a reopening.

The government finally contends that to allow the board to refuse to reopen despite the presentment of a prima facie case would not obliterate the distinction between a refusal to reopen and a denial of a requested classification after reopening. Whether it would or would not have this effect, *it would completely eliminate the role of the courts in reviewing refusals to reopen.* All the board would have to say is that, "We exercised our discretion, considered the facts and found a reopening not justified because the facts supporting the claimed classification simply were not true." Whenever the facts are in dispute, as will frequently be the case, the court could not find that the board "abused its discretion."

In the case of a claim for conscientious objector status the board could always find that the registrant was not sincere and, therefore, "appropriately discount the written representations accompanying the request." (Brief for United States, p. 39). If it granted a "courtesy interview," as in the case at bar, its action would be completely non-reviewable, because then it would be relying on the "substantially contemporaneous statements made at the interview." What stands out most clearly in the case at bar is that there is nothing more the board could have done and no further information it could have considered if it had in fact reopened the classification. To accept the government's position is to allow the board to characterize its own action as a refusal to reopen or a reopening in fact, depending on whether it wants to permit the registrant to appeal, and to effectively insulate its action from judicial scrutiny. The grant of such free-wheeling power to draft boards is neither sanctioned by the regulations nor consistent with due process of law.

The present petitioner presented a claim for classification as a conscientious objector, probably the most difficult classification for a board to determine. Such a determination requires not only the verification of facts, but the evaluation of

sincerity. The petitioner had presented this claim to the board for the first time and, as the government concedes, he made out a prima facie case of entitlement. To allow the board to dispose of this claim summarily, to allow it to decide that the petitioner was not sincere and to foreclose review of the determination by an appeal board, is nowhere authorized by the regulations. To read such power into the regulations upsets the orderly procedure that is provided for reclassification, deprives registrants of the opportunity to appeal a determination on the merits by the local board, and effectively eliminates judicial review of a board's refusal to reopen. No valid reason has been advanced for so doing.

B. The Board In Fact Did Not Question Petitioner's Veracity or Sincerity and Had No Compelling Reason To Do So.

Even if the Court were to accept the government's argument that the board has discretion to refuse to reopen where it questions the registrant's veracity and sincerity, the board would not have had such discretion in the case at bar. The government has gone through the file and indicated matters that, in its view, *could* have caused the board to question the petitioner's sincerity and veracity. Although it is submitted that these matters would not constitute a "compelling reason" to question veracity or sincerity, the more important question is what *did the board in fact do.* The government's argument proceeds solely on inference, what it thinks the board could have done rather than what the board did in fact. It attempts to discount the statements of the board members that they "assumed the petitioner was sincere," saying that this only meant that he was sincere in his remarks about the importance of his work in Appalachia. (Brief for the United States, p. 43). It also says that the assumption that members Sherman and Wolking (who at all times purported to speak for the entire board) meant to say that they regarded the petitioner as sincere

in his claim to being a conscientious objector, is not reconcilable with their testimony viewed as a whole. Finally, it argues that, "If they assumed petitioner was sincere in that representation, it would have been entirely inconsistent, and indeed, inexplicable, for them to have voted not to reopen." (Brief for United States, p. 43). As to the latter point, petitioner has suggested that the failure to reopen was indeed inexplicable, which is why his conviction should be reversed. But if a reason need be found, it may lie in the fact that the board members did not read the petitioner's file, particularly his Form 150, with any degree of care, and lacked a minimum understanding of the applicable statute and regulations to pass intelligently on his claim.

Leaving that aside, if the reason for the board's refusal to reopen was that they found that the petitioner was not sincere in his beliefs and therefore, discounted the statements in his Form 150 and the supporting letters, *is it not strange that no board member ever said so and that there is no indication in the file that this was the board's reason for its action?* The government has not pointed to one place in the record where any board member *affirmatively* stated that he disbelieved the truth of the petitioner's representations or disbelieved his sincerity. The board's position, as recorded in the file, was that, "The information in the file did not warrant reopening of 1-A classification." (A. 14, 70). If the reason was that "registrant was not sincere in his beliefs," why, may it be asked, was this not recorded in the file? Board Member Wolking, who said that he read the Form 150 stated that *after reading the form*, his conclusion was that this did not entitle the petitioner to a reopening of his classification. (A. 82). Mr. Huddleston, the government's attorney, kept trying to bring out the fact that the board members assumed that the petitioner was sincere. (A. 84); (Civ. Tr. 60, 61). If the government is going to base its

argument on the fact that the board found the petitioner was not sincere, if should be able to point to some evidence in the record that *affirmatively* supports its conclusion. This is all the more so, since the action of the board must be supported on the grounds that the board gave for such action. *Gatchell v. United States,* 378 F.2d 287 (9th Cir., 1967). And in conscientious objection cases a determination of insincerity must be supported by some factual finding. *Witmer v. United States,* 348 U.S. 375 (1955); *United States v. Martin,* 416 F.2d 44 (10th Cir., 1969). The reason the board gave for refusing to reopen was that the petitioner failed to make out a prima facie case, not that, although he did make out a prima facie case, the board had reason to believe he was not sincere, and finding that he was not, refused to reopen.

In any event, the board had no reason to question the truth of the petitioner's allegations relating to his religious belief, which were supported by a letter from a Catholic priest. (A. 49). He filed his claim as soon as it matured, and as he explained, his experiences in Eastern Kentucky, including the sedition prosecution to which he was subject, were the catalyst, causing his generalized belief in pacifism and non-violence to crystallize into opposition to participation in war. (A. 21-22, 41-42). He could not have filed earlier because the requisite belief did not exist. Also, the claim was made almost two months after his request for an occupational deferment had been denied. The chronology of events, therefore, would not justify the conclusion that he was insincere. *United States v. Martin, supra.* In any event, the time when the petitioner filed his claim did not, in fact, appear to be of concern to the board, for Board Chairman Sherman testified that he did not recall any questions being asked about why the petitioner did not file for conscientious objector status earlier. (A. 68).

Petitioner's repeated references to his work in Appalachia, far

from being inconsistent with his claim of conscientious objection, were, in his view, the strongest evidence he could produce in support of it. If the board members had read his Form 150 and the supporting letters with any degree of care, they would have understood that. And he was entitled to assume that anti-poverty work would qualify as appropriate civilian work if he were classified as a conscientious objector. 32 C.F.R. Section 1660.1. The "tone" of the letter of November 14 would seem to further attest to his sincerity, but, in any event, that letter is not particularly relevant, since, as the government elsewhere points out, the decision not to reopen was made immediately after the interview on November 9. (Brief for United States, p. 42). It is submitted that, considering all the information in the file, any conclusion that the petitioner was not a conscientious objector would have been "solely on the basis of suspicion and speculation." *Dickinson v. United States*, 346 U.S. 389 (1953). At least, it is clear that, based on the information in the file and what was said at the "courtesy interview," the board had "no compelling reason to question the petitioner's sincerity."

The board did not in fact question the petitioner's sincerity. It decided that he did not make out a prima facie case for classification as a conscientious objector. That conclusion *is* inexplicable except for the fact that the board members did not carefully read the file and did not understand what a conscientious objector was. The very facts of this case demonstrate the dangers inherent in allowing the board to refuse to reopen when a prima facie case has been presented.

This should demonstrate most cogently the unsoundness of the proposition for which the government is contending.[1]

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1. It should also be noted that only after a prima facie case has been presented, would it be relevant to consider the question of sincerity since the nature of a registrant's prima facie case determines the type of evidence needed to rebut his claim. *Witmer v. United States*, 348 U.S. 375, 382 (1955).

II

The Petitioner's Claim for Classification as a Conscientious Objector Was Not Given Full and Fair Consideration by His Local Board.

In this portion of its brief the government says that the pertinent decision on petitioner's classification was not made until the January meeting. (Brief for United States, p. 47). However, earlier it states that, "Following the courtesy interview [in November] the three members present discussed the case briefly and came to the unanimous conclusion that there was no basis or justification for reopening the classification." (Brief for United States, p. 42). As Board Chairman Sherman testified, the matter was not formally decided until the January meeting since until that time it was believed that the petitioner was under indictment, but at the January meeting, "We were free to go ahead and act on the file and we would readopt or reaffirm or reiterate our action of November the 9th." (Civ. Tr. 49). It is clear that the crucial decision not to reopen was made on November 9. The date the decision was made becomes significant in view of the government's argument that Board member Downes, who admittedly only "scanned" the file prior to the November 9 "courtesy hearing," said that he read the Form 150 prior to the January meeting. (Brief for United States, p. 46-7). Board member Rickert, who was not present at the November meeting, also said he read the file prior to the January meeting, but, as pointed out previously, by that time the effective decision had been made.

The decision, therefore, was made by members Downes, Wolking and Sherman, and it was made at the November meeting. Mr. Downes testified that he only "scanned the file, because he was the newest member of the board and was not familiar with what was in the file at all." (A. 74). He did not

recall reading the Form 150 at that time, (A. 74), and stated that he based his decision on "the basis of what was discussed, what we were able to glean from his own statements.' (A. 81). Mr. Wolking testified that he would have read what was in the file, including the Form 150, although he did not specifically recall having gone through it or how much time he spent on it. (A. 84). Chairman Sherman stated that, "The board members looked over his file before he came in as we do anybody else." (A. 91). This was the extent of the consideration that was given to the file prior to the decision.

The "courtesy hearing" was held on the afternoon of November 9, and there were several registrants ahead of the petitioner who also met with the board. (Civ. Tr. 154). According to Mr. Downes, the clerk told the board members that the petitioner was waiting, and "all of the board members, I believe, or those who cared to look at the file," could do so. (A. 77). The "normal procedure" then was to look at the file only before the registrant came into the interview. *There simply would not have been time for each of the three board members to read the file, particularly the detailed answers to Form 150, even if they had wanted to do so.* Mr. Wolking's statement that he "read" the file must be viewed in this context, and it is understandable that he did not remember how much time he spent on it. Mr. Downes did not even make a pretense of having read it, and Chairman Sherman said merely that the members "looked it over." According to the government, the three members then discussed the case "briefly" and came to the unanimous conclusion that "there was no basis or justification for reopening the classification." (Brief for United States, p. 42).

This is the kind of consideration that the petitioner's claim for classification as a conscientious objector received, and it is on this basis that he must serve five years in prison. The

government says that the board members must have found that the petitioner was not sincere, because if they assumed that the petitioner was sincere in his representations, "It would have been entirely inconsistent, and indeed, inexplicable, for them to have voted not to reopen." The above suggests that there may have been another reason—*that they never really read his file.* Surely, this cannot be due process of law.

The government also argues that the members of the board were not shown to be incompetent. At the same time it argues that petitioner's counsel was permitted to go too far in examining them as to their competency (Brief for United States, p. 51). In point of fact, petitioner's counsel was severely restricted in his efforts to show that the board members lacked a minimum understanding of the applicable statute and regulations. (A. 78). But enough has come through to make it clear that the members were very deficient in their understanding. It *was* significant that the Chairman, the only lawyer on the board, thought that one who would kill in self-defense could not be classified as a conscientious objector, since the petitioner had been charged with flourishing a deadly weapon. (A. 38). It is inaccurate, therefore, to say that the variance between the chairman's definition and the statutory one was not in issue. (Brief for United States, p. 49). More significantly, the testimony of all the members, taken together, it is submitted, demonstrates little or no understanding of the applicable law. This made it impossible for them to pass intelligently on petitioner's claim.

The matter of reading the file and understanding the applicable law is of crucial importance, not only in the case at bar, but in all cases of selective service classification. The actions of the draft board, despite their impact on the lives of young men, are not subject to judicial review in the same manner as the actions of other administrative agencies. Judicial

review of a registrant's classification has been described as the "narrowest known to the law." *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir., 1957). The classification may be set aside only if it is without "basis in fact," and the courts may not look for "substantial evidence" to support it. *Witmer v. United States*, 348 U.S. 375, 381 (1955). A local board may know nothing of the applicable law and may not even read the file. If the registrant refuses induction, the file is turned over to the United States Attorney. He, being an expert on the law and familiar with judicial decisions interpreting it, can comb the file and can come up with a fact here, an inconsistent statement there, that will provide a basis in fact for the board's determination, particularly with respect to something as subjective as "sincerity." This is the reality of the situation in all too many cases, and it is amply demonstrated in the case at bar.

If registrants are to receive a modicum of administrative due process from local boards, the board members must be required to carefully read and consider the file, particularly where the registrant claims a status such as conscientious objector. As a defense to a criminal prosecution the registrant should be able to show that his claim was not fully considered and that the board members did not carefully review his file. He should also be able to show that they lacked a minimum understanding of the applicable statute and regulations that they are called upon to administer. Only in this way can registrants be assured of due process of law, which, it is submitted, was denied to the present petitioner.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, it is respectfully submitted that the judgment of the Court below should be reversed and the conviction of the petitioner be set aside.

Respectfully submitted,

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